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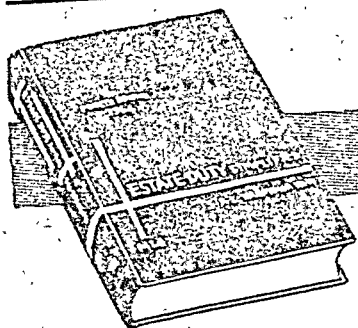
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INNOCENT MISREPRESENTATION—LIABILITY FOR

By

K. R. DIXIT, LL.M. (LONDON),

Reader in Law,

Nagpur University, Nagpur.

A source of unmixed pleasure it is to write an obituary on *Candler v. Crane Christmas & Co*¹. For seventy years the principle of this case has dogged the decisions which have had something to do with the law relating to innocent misrepresentations. If *A* made statement about a fact to *B* which was false but which *A* believed to be true and on which *A* knew *B* would rely and *B* suffered some injury as a result of it, *B* had no remedy though *A* was grossly negligent in making that statement. Such was the unhappy state of the Law.

The decision that clears up this state of affairs is the decision of the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller and Partners, Ltd.*².

The plaintiffs, in this case, were a firm of advertising agents who received certain orders from a Company called Easipower Ltd. They asked their bankers to communicate with the bankers of Easipower Ltd. to find out about the credit-worthiness of Easipower Ltd. The bankers of Easipower who were the defendants in this case gave a favourable reference to the plaintiff's Bank. The reference was marked confidential, for the use of the plaintiff's Bank only and without responsibility on the part of the defendants. The plaintiffs relied on it and as a result of it lost over £17,000. The case was decided on the basis that the defendants knew that the inquiry was in connection with an advertising contract and it was at least probable that the information was wanted by the advertising contractors. It was regarded as if the negligent misrepresentation was made to the plaintiffs. It was held that but for their disclaimer of responsibility the defendants would have been liable. Under the circumstances it seems fairly obvious that *Candler* is out—bell, book and candle.

It may be recalled, what happened in *Candler*. In that case the plaintiff was a potential investor in a company and wanted to see its accounts before investing in it. The defendants who were the company's accountants were told to complete the accounts as soon as possible and show them to the plaintiff. The plaintiff saw these completed accounts, discussed them with the defendants and took a copy of them. The accounts had been negligently prepared and gave a false picture. It was held that the plaintiff could not sue the defendants for the loss caused to him because there was no contractual nexus between them. The mischief of this decision, however, started with the judgment of the House of Lords in *Le Lievre v. Gould*³. It was because the majority in the Court of Appeal (Denning, L.J., dissenting) held that they were bound by the decision of the House of Lords in *Le Lievre v. Gould*³ that they decided the way they did.

Consideration, therefore, of *Donaghy v. Stevenson*⁴ and *Derry v. Peek*⁵, in this case, became necessary. The case (here relied upon) that interpreted *Derry v. Peek*⁵ was *Nocton v. Lord Ashburton*⁶. The plaintiffs argued that it removed the restriction which *Derry v. Peek*⁵ was thought to have put on liability for negligent misrepresentation. The defendants argued that after adding fiduciary obligation to contract as a special duty it closed the door to any further expansion. Their Lordships held that the door was not shut to any further expansion.

1. L.R. (1951) 2 K.B. 164.

2. (1963) 3 W.L.R. 101.

3. L.R. (1893) 1 Q.B. 491.

4. L.R. (1932) A.C. 562.

5. (1889) L.R. 14 App. Cas. 337.

6. L.R. (1914) A.C. 932.

Question then arises as to the classes of cases in which there might be a remedy for injury caused by misstatements. The position may briefly be stated as follows. There is a remedy (1) where there is a fiduciary relationship, (2) where there is an implied or express contract, (3) where there is no fiduciary or contractual relationship¹. Two further inquiries are raised whether there is any duty at all owed by the defendant to the plaintiff; if so the nature of the duty. There may be circumstances in which the only duty owed may be of being honest or there may be circumstances in which there might be duty not only of being honest, but also of taking reasonable care. It is with this last class that we are here concerned.

As to the duty of being honest, Lord Reid, Lord Morris and Lord Hodson held that apart from the disclaimer there was, in this case, a duty of honesty². The position taken by Lord Devlin is not clear and we have no pronouncement from Lord Pearce on this point.

We are then left with the last and most interesting point regarding the circumstances in which there might be a duty of taking reasonable care. Here the case was argued from two angles, (1) that those who held themselves out as possessing a special skill are under a duty to exercise it with reasonable care and (2) from the notion of proximity introduced by Lord Esher in *Heaven v. Pender*³. All their Lordships agreed that in any case the crux of the matter was assumption of responsibility by the defendant. Lord Reid declined to consider the question of proximity⁴ but all the other Law Lords discussed that question in one way or the other. Possession of special skill is a fact which is easily ascertainable, the more difficult problem is investigation into the question of proximity. In order that this notion may be appreciated what has been said to explain it may be stated *seriatim*.

"If one man is near to another or is near to the property of another a duty is upon him not to do that which may cause personal injury to that other, or may injure his property⁵".

"Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.⁶"

Lord Devlin clarified that the principle of proximity was the "general conception of relations giving rise to a duty of care."⁷

".....in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make a careful inquiry....."⁸.

".....the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required where it was reasonable for him to do that and where the other gave the information or advice where he knew or ought to have known that the inquirer was relying on him"⁹.

According to Lord Pearce such relationship must concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer.¹⁰

While Lord Hodson and Lord Devlin agreed with the above propositions of Lord Reid and Lord Morris, Lord Devlin introduced a new test.....".....wherever there is a relationship equivalent to a contract there is a duty of care"¹¹.

1. Per Lord Hodson at page 126.

2. Per Lord Reid at page 114, per Lord Morris at page 124 and per Lord Hodson at page 132.

3. 11 Q.B.D. 503, 509.

4. At page 106.

5. Per Lord Esher in *Heaven v. Pender*, 11 Q.B.D. 503, 509.

6. Per Lord Atkin in *Donaghy v. Stevenson*, (1932) A.C. 562, 580.

7. At page 142.

8. Per Lord Morris at page 124.

9. Per Lord Reid at page 109.

10. At page 155.

11. At page 147.

The following observations seem pertinent here :—

In the notion of proximity there has been a shift from the idea of physical proximity to mental proximity.

In this case there is a definite suggestion of objective test of proximity and liability being made to depend on constructive knowledge of the defendant. It was here not necessary to do this because both *Candler*¹ and this case seem to have been decided on the basis of actual knowledge. In doing so the decision here goes further than what Lord Denning said in his dissenting judgment in *Candler's case*¹ since according to him the duty is owed to persons to whom they themselves, in person or by their agents show these statements. But it seems necessary to add a condition that if the plaintiff has had an adequate opportunity of finding out the truth he should not recover. The point of distinction made by Denning, L.J., in *Candler's case*¹ is on this basis.

It seems that while the test laid down by Lord Denning is too narrow one cannot escape the apprehension that the objective test laid down here might include cases which should be excluded though liability should not be confined to professional people.

As a first proposition the statement of Mr. Foster for the respondents is acceptable *i.e.*, there is no general duty not to make careless statements.² A person should not be liable for negligence in respect of general information given by him with no particular information in mind *e.g.*, a marine hydrographer who fails to show a submerged rock on his map or an author who makes a careless statement in his published work.

Secondly, the form of the inquiry and the answer should be considered important.

Thirdly, the condition imposed by Lord Denning in *Candler's case*¹ seems reasonable *i.e.*, the duty extends only to those transactions for which the statement was required.³

As for the rest the words of Lord Pearce must suffice *i.e.*, "How wide the duty of a care in negligence is to be laid depends ultimately upon the Court's assessment of the demands of society for protection from carelessness of others".

As a side effect of the principle in this case it seems that for damages for careless statements in company prospectuses, statutory provisions alone need not be relied upon.

What Lord Pearce said here seems to be in agreement with what Lord Denning said in *Candler's case*¹ *i.e.*, the duty is imposed only on certain professional people.⁴

In the field of negligence the undesirable barrier between contract and tort has melted. This concerns the doctrine of consideration: "A promise given without consideration to perform a service cannot be enforced.....but if the service is in fact performed and done negligently, the promisee can recover in an action in tort"⁵. (One is tempted to recall the *High Trees Case*).⁶ The side wind about which Lord Denning spoke in *Combe v. Combe*⁷ seems to be getting stronger). Indeed Lord Devlin pointed out that the distinction made in the law relating to innocent misrepresentation between contract and tort was due to the doctrine of consideration.⁸

1. L.R. (1951) 2 K.B. 164.

2. Per Lord Devlin at page 134.

3. At page 182-3.

4. Lord Pearce at page 155 and Denning, L. J., at page 179.

5. Per Lord Devlin at page 143.

6. *Central London Trust Ltd. v. High Trees House Ltd.*, L.R. (1947) K.B. 130.

7. L.R. (1951) 2 K.B. 215 (C.A.).

8. At page 143.

The distinction here made by some of the Law Lords between liability for acts and liability for words is artificial and untenable¹. Surely what needs recognition is the fact of injury and not by what it has been caused. If the injury has been caused under circumstances when there was a duty of care it ought to be remediable and the remedy cannot depend upon the question whether the injury was caused by acts or words. As was pointed out by Lord Devlin this distinction is drawn because many times advice or information is given on the basis of acts or omissions². It was admitted that although *Donaghe v. Stevenson*³ and *George v. Skivington*⁴ concerned injury due to things and acts the decisions were not confined to them⁵. The distinction goes to matters of proof not of principle⁶. And so one finds that as the categories of negligence are never classed the principle of *Donaghe v. Stevenson*³ is being slowly worked out.

The position of bankers needs to be noted here. The principle accepted here is ".....if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make a careful inquiry a person takes upon himself to give information or advice or allows his information or advice to be passed on to another person who as he knows or should know, will place reliance upon it, then a duty of care will arise"⁷. Looking to the circumstances of this case it would seem that a duty of care arises. But both Lord Morris and Lord Hodson say that a banker when giving a common reference has only a duty of honesty⁸. Now what does that mean? It simply means that the banker must not tell a lie. As for the duty of care both their Lordships adopted the words of Pearson, L.J., in the Court of Appeal. The banker is not expected to "expend time and trouble in searching records, studying documents, weighing and comparing the favourable and unfavourable features and producing a well-balanced and well-worded report". This would only mean that when an usual reference is made the banker must only give an answer strictly according to what he knows and by having a quick glance at one or two relevant files in his possession. There is of course the further difficulty for the banker to reconcile his duty to his customer with his desire to give a balanced reply⁹. The only way in which that problem can be solved, it seems, would be that the customer when giving permission to the banker must be deemed to have released him from his duty of non-disclosure. (*Quære*: whether the facts within the banker's knowledge can be disclosed? *Semble*.....not). For his safety the banker had better be careful—only to state his opinion strictly necessary under the circumstances never to go into facts.

1. Lord Reid at page 106.

2. At page 136.

3. L.R. (1932) A.C. 562.

4. (1869) L.R. 5. Ex. 1.

5. Per Lord Morris at page 118 and Lord Hodson at page 128.

6. Per Lord Hodson at page 130.

7. Per Lord Morris at page 124.

8. At page 125 and at page 132 respectively.

9. Per Lord Reid at page 111.

[SUPREME COURT.]

*P. B. Gajendragadkar, K. N. Wanchoo, and
K. C. Das Gupta, JJ.*
14th November, 1963.

*Greaves Cotton & Co., Ltd. v.
Their Workmen.*
C.As. Nos. 272 to 280 of 1962.

Industrial Disputes—Fixing wage scales—Unskilled workmen—If can be classified according to degree of skill—Clerical and subordinate staff—Dearness allowance.

There cannot be degrees of want of skill among the unskilled class. The tribunal therefore was not justified in creating the class of higher unskilled. It is neither necessary nor desirable to create a higher unskilled category.

It will be open to the tribunal to fix the same rates of dearness allowance for factory-workmen as for clerical staff; but in doing so the tribunal must when making comparisons take into account the total wage packet (i.e., basic wages fixed by it as well as dearness allowance) and then compare it with the total wage packet of comparable concerns and thus arrive at a just figure for basic wage, for each category of factory-workmen. But the entire matter is left to the tribunal and it may follow such method as it thinks best so long as it arrives at a fair conclusion after making the necessary comparison.

The question therefore whether adjustment should be granted or not is always, a question depending upon the facts and circumstances of each case. The facts in these cases are different from the facts in the case of the *French Motor Car Co.'s case*, (1962) 2 L.L.J. 744.

S. V. Gupte, Additional Solicitor-General of India, (*N. V. Phadke*, Advocate, and *J. B. Dadachanji, O. C. Mathur* and *Ravinder Narain*, Advocates of *Messrs. J. B. Dadachanji & Co.*, with him), for Appellants (In all the appeals).

M. C. Setalvad, Senior Advocate (*K. T. Sule, Madan, G. Phadnis, Jitendra Sharma* and *Janardan Sharma*, Advocates, with him), for Respondents (in C.A. No. 272 of 1962).

K. T. Sule, Madan, G. Phadnis, Jitendra Sharma and *Janardan Sharma*, Advocates, for Respondents (in C.As. Nos. 273 to 280 of 1962).

G.R.

Appeals allowed in part and cases remanded.

[SUPREME COURT.]

*P. B. Gajendragadkar, K. Subba Rao,
K. N. Wanchoo, N. Rajagopala Ayyangar,
and J. R. Mudholkar, JJ.*
15th November, 1963.

*The State of Punjab v.
The Okara Grain Buyers
Syndicate Ltd., Okara.*
C.As. Nos. 439-451 of 1961.

Displaced Persons (Debts Adjustment) Act (LXX of 1951)—Displaced Persons (Institution of Suits) Act, 1948—Civil Procedure Code (V of 1908), section 20—Indian Independence (Rights, Property and Liabilities) Order, 1947 read with Article 300 of the Constitution—Displaced Persons (Claims) Act, 1950—Section 176 of the Government of India Act—Meaning of words “debt”, “person” and “ordinarily residing”.

This Court has, in *Director of Rationing and Distribution v. The Corporation of Calcutta and others*, A.I.R. 1960 S.C. 1355 : (1961) 1 S.C.J. 406 : (1961) 1 M.L.J. (S.C) 88 : (1961) 1 An.W.R. (S.C.) 88: (1961) M.L.J. (Cr.) 225 : (1961) 1 S.C.R. 158, accepted as correct the rule of construction adopted in the U.K. that the State is not bound by a statute unless it is so provided in express terms or by necessary implication. Applying this principle of interpretation to the terms of the Displaced Persons Debts Adjustment Act, 1951 far from the State being expressly named as being bound, there are indications arising from the nature and description of the persons brought within the scope of the enactment which clearly exclude the State and the obligations of the State from its purview.

The Act was preceded by the Displaced Persons Suits Act, 1948 which employed substantially the same phraseology as the Act now under consideration. The re-enactment of the law, on the expiry of the Act of 1948, adopting substantially the same phraseology in section 13 and other relevant sections to indicate the "person" against whom the claim could be made was therefore a legislative confirmation of that ruling (*M/s. Nagi Brothers v. The Dominion of India*, I.L.R. 4 Punj. 358), and a strong indication that Parliament intended the same result.

In our judgment nothing turns on the exact proportion of the cases where the party would be without a remedy. If the terms of the enactment were ambiguous and had to be interpreted in the light of the circumstance whether the one construction or the other would leave parties without a remedy, then in that event something might depend on whether it was only a marginal case that was beyond the provisions of the Act or the bulk of the cases. That, however, is not the position here.

S. M. Sikri, Advocate-General for the State of Punjab and *N. S. Bindra*, Senior Advocate (*R. N. Sachthy*, Advocate, with them), for Appellant (in all the appeals).

S. K. Kapur, Advocate and *K. K. Jain*, Advocate for *B. P. Maheshwari*, Advocate, for Respondent No. 1 (A) (in G.A.No. 439 of 1961).

Sardar Singh, Advocate, for Respondents Nos. 2 (A), 3 (A), 4 (A), 5, 6, 7, 8 (A) 9, 10, 11, 12 and 13 (A).

Daulat Ram Prem, Senior Advocate, (*R. N. Sachthy*, Advocate, with him), for Respondent No. 13 (B) (Union of India).

G.R.

Appeals dismissed.

[SUPREME COURT.]

*A. K. Sarkar, J. C. Shah, and
Raghubar Dayal, JJ.*
15th November, 1963.

The State of Madras v.
Karumuthu Thiagarajan Chettiar.
C.A. No. 478 of 1962.

*Madras Estates Land Act (I of 1908)—Notifications under Act (XXX of 1947)—
Madras Estates Amendment Act (II of 1945).*

The enquiry before the Inam Commissioner involved at least two distinct steps :

- (i) Enquiry as to what was the original grant; and
- (ii) What area should be confirmed or recognised in favour of a claimant.

In holding an enquiry into the first step, the Inam Commissioner could not be seeking to confirm or recognise the grant. The Commissioner was thereby laying a foundation for making the order of confirmation or recognition. In assuming that a conclusion on the first automatically resulted in confirmation of the grant the learned Judge obliterated the distinction between the two. In our view the formula devised by Subba Rao, J., in *K. Somasundaram v. The State of Madras*, (1952) 2 M.L.J. 202 : A.I.R. 1953 Mad. 246, is substantially correct.

In the instant case it has not been shown that there was any Inam grant of the village of Siruvengai to Peruvengai which had been confirmed by the Government. The lands in that part of the village which was confirmed as an Inam cannot constitute an "estate" within section 3 (2) (d) of the Estates Land Act.

A. Ranganadham Chetty, Senior Advocate, (*A. V. Rangam*, Advocate, with him), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate, (*K. Jayaram* and *R. Ganapathy Iyer*, Advocates, with him), for Respondent.

G.R.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANGHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

Mohmedalli and others

.. Petitioners*

v.

The Union of India and another

.. Respondents.

Employees' Provident Fund Act (XIX of 1952)—Restaurants and Hotels—Notification extending the Act to—Validity of—If suffers from excessive delegation—Section 2 (b)—Basic wages—Wages and salary—Distinction, if any—Act, if intended to apply only to wage earners—Scheme under the Act—No violation of Article 14 of the Constitution of India (1950).

Interpretation of Statutes—Legislation—Excessive delegation—Tests.

It cannot be asserted that the powers entrusted to the Central Government to bring within the purview of the Employees' Provident Fund Act such establishments or class of establishments as the Government may by notification in the Official Gazette specify is uncontrolled and uncanalised. The whole Act is directed to institute provident funds for the benefit of employees in factories and other establishments, as the Preamble indicates. The institution of provident fund for employees is too well established to admit of any doubt about its utility as a measure of social justice. The underlying idea behind the provisions of the Act is to bring all kinds of employees within its fold as and when the Central Government might think fit, after reviewing the circumstances of each class of establishments. The Act has given sufficient indication of the policy underlying its provisions, namely, that it shall apply to all factories engaged in any kind of industry and to all other establishments employing 20 or more persons. It has been repeatedly laid down by the Supreme Court that where the discretion to apply the provisions of a particular statute is left with Government, it will be presumed that the discretion so vested in such a high authority will not be abused. The Government is in a position to have all the relevant and necessary information in relation to each kind of establishment enabling it to determine which of such establishments can bear the additional burden of making contribution by way of provident fund for the benefit of its employees. The power to exempt given to the appropriate Government under section 17 is not uncanalised because both clauses (a) and (b) of that section postulate that the exemption would be granted on the ground that the employees of those establishments are already in the enjoyment of benefits in the nature of provident fund, pension or gratuity not less favourable to them than under the Act.

The question whether or not a particular piece of legislation suffers from the vice of excessive delegation must be determined with reference to the facts and circumstances in the background of which the provisions of the statute impugned had been enacted. If, on a review of all the facts and circumstances and of the relevant provisions of the statute, the Court is in a position to say that the Legislature had clearly indicated the underlying principle of the legislation and laid down criteria and proper standards but had left the application of those principles and standards to individual cases in the hands of the Executive, it cannot be said that there was excessive delegation of powers by the Legislature. On the other hand, if a review of all those facts and circumstances and the provisions of the statute, including the Preamble, leaves the Court guessing as to the principles and standards, then the delegate has been entrusted not with the mere function of applying the law to individual cases, but with a substantial portion of legislative power itself.

Both 'salary' and 'wages' are emoluments paid to an employee by way of recompense for his labour. Neither of the two terms is a 'term of art'. The Act has not defined wages; it has only defined "basic wages" as all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash to him. (Section 2 (b).) 'Salary', on the other hand, is remuneration paid to an employee whose period of engagement is more or less permanent in character, for other than manual or relatively unskilled labour. The distinction between skilled and unskilled labour itself is not very definite and it cannot be said, that the remuneration for skilled labour is not 'wages'. The Act itself has not made any distinction between 'wages' and 'salary'. Both may be paid weekly, fortnightly or monthly, though remuneration for the day's work is not ordinarily termed 'salary'. Simply because wages for the month run into hundreds, as they very often do now, would not mean that the employee is not earning wages, properly so called.

The Act applies to all establishments, except those recited in section 16.

Clause (a) of section 16, as it now stands, has exempted establishments registered under the Co-operative Societies Act, because it is well-known that it is the settled policy of the Government to foster co-operative societies with a view to their development and growth in the interest of the community. Clause (b) has reference to establishments which have been in existence for less than 3 years or 5 years, as the case may be. That is an understandable classification with a view to save newly started establishments from the additional burden of making contribution to provident fund in respect of its employees. It is clear that the exemption is a short-lived one because with the efflux of 3 or 5 years' period, they will automatically come under the scheme framed under the Act. An

establishment coming under the exemptions granted or to be granted under section 17 does not mean that the establishment bears less burden of its share of contribution to the fund. It is equally clear that all hotels and restaurants come within the scope of the notification impugned in this case. There is absolutely no reason for complaint that the petitioners' establishment of that class has been chosen for hostile discrimination.

Petition under Article 32 of the Constitution of India for the enforcement of Fundamental Rights.

N. C. Chatterjee, Senior Advocate, (*S. K. Kapur* and *K. K. Jain*, Advocates, with him), for Petitioners.

H. N. Sanyal, Additional Solicitor General of India, (*M. S. K. Sastri* and *R. H. Dhebar*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Sinha, C. J.—This petition, under Article 32 of the Constitution, challenges the vires of certain provisions of the Employees' Provident Funds Act (XIX of 1952) which hereinafter will be referred to as the Act, and the scheme framed thereunder. The respondents to this petition are the Union of India and the Regional Provident Fund Commissioner.

The petition is founded on the following allegations. The petitioners, 5 in number, are citizens of India and are carrying on business of running a restaurant and general stores under the name and style of "Messrs. George Restaurant and Stores" at 20, Appollo Street, Fort, Bombay-1 since September, 1958. They are running this business as a partnership firm, registered under the Indian Partnership Act. The firm employs 43 persons, including cooks, waiters, tea-makers, bill clerks and two store-clerks. Besides paying salary to their employees, the petitioners give them free food and other personal allowances, which it is not necessary to set out in detail. In exercise of the powers conferred by section 1 (3) (b) of the Act, the Central Government issued the Notification No. G.S.R. 704, dated 16th May, 1961, in the following terms :

"G.S.R. 704.—In exercise of the powers, conferred by clause (b) of sub-section (3) of section 1 of the Employees' Provident Fund Act, 1952 (XIX of 1952) the Central Government hereby directs that with effect from the 30th June, 1961, the said Act shall apply to the following classes of establishments, in each of which twenty or more persons are employed, namely :—

i. Hotels.

ii. Restaurants."

As a result of the notification aforesaid, the operation of the Act has been extended to hotels and restaurants, including the one run by the petitioners. Subsequently the Central Government issued a notification under section 5, read with section 7 (1) of the Act, the relevant portions of which are in these terms :

"G.S.R. 783.—In exercise of the powers conferred by section 5 read with sub-section (1) of section 7 of the Employees' Provident Funds Act, 1952 (XIX of 1952), the Central Government hereby makes the following Scheme further to amend the Employees' Provident Fund Scheme, 1952, namely :—

1. This Scheme may be called the Employees' Provident Funds (Third Amendment) Scheme, 1961.

2. In the Employees' Provident Fund Scheme, 1952, in clause (b) of sub-paragraph (3) of paragraph 1, sub-clause (xvii) shall be renumbered as sub-clause (xix) thereof and the following shall be inserted as sub-clauses (xvii) and (xviii), namely : " (xvii) as respects hotels and restaurants covered by the notification of the Government of India in the Ministry of Labour and Employment No. G.S.R. 704, dated the 16th May, 1961, come into force on the 30th day of June, 1961 : "

The said notification introduced the scheme known as the Employees' Provident Funds (Third Amendment) Scheme, 1961. The petitioners challenge the constitutionality of the scheme aforesaid, and the section of the Act in pursuance of which it was brought into existence. The petitioners pray for a writ or order or direction quashing the said notifications and for issue of a *mandamus* to the respondents not to apply the said scheme to the petitioners' establishment.

Before dealing with the specific grounds of attack raised in support of the petition, it is necessary to set out briefly the relevant provisions of the Act. The Act applies to every establishment which is a factory engaged in any industry specified

in Schedule I and in which 20 or more persons are employed, and to any other establishment employing 20 or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf. 'Employee' has been defined in section 2 (f) as follows :

" 'employee' means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets his wages directly or indirectly from the employer, and includes any person employed by or through a contractor in or in connection with the work of the establishment."

Section 5 authorises the Central Government to frame a scheme to be called the Employees' Provident Fund Scheme, for the establishment of provident funds under the Act for employees or any class of employees and establishments or class of establishments to which the scheme may be applied, by notification in the Official Gazette. The contribution of the employer to the fund shall be 6 1/4 per cent. of the basic wages and dearness allowance and retaining allowance if any, and the employee's contribution shall be equal to the employer's contribution, subject to his contribution being raised to the maximum of 8 1/3 per cent., if the employee so desires and the scheme so provides. Dearness allowance for the purposes of contribution shall be deemed to include also the cash value of any food concession allowed to the employee. Section 7 authorises the Central Government to add to, amend or vary any scheme framed under the Act. By section 16 it is provided that the Act shall not apply to any establishment registered under the Co-operative Societies Act of 1912, or to any other establishment employing 50 or more persons or 20 or more but less than 50 persons until the expiry of 3 years in the case of the former and 5 years in the case of the latter from the date on which the establishment is set up. Section 17 empowers the appropriate Government, by notification in the Official Gazette, to exempt from the operation of all or any of the provisions of any scheme any establishment to which the Act applies, if in the opinion of the Government the rules of its provident fund with respect to the rates of contribution are not less favourable than those specified in section 6 and the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under this Act ; as also any establishment if the employees of such establishment are in enjoyment of benefits in the nature of provident fund, pension or gratuity, which on the whole are not less favourable to such employees. Section 19 provides for delegation of powers.

It has been contended (1) that section 1 (3) (b) under which the notification including restaurants and hotels were brought under the operation of the Act, is invalid because it confers uncontrolled and uncanalised power on the Government ; (2) that the Act was intended to apply to mere wage-earners and not to salaried people and that, therefore, the two notifications as a result of which the petitioners' employees have been brought within the purview of the Act are bad inasmuch as they are salaried employees and not mere wage-earners ; and (3) that the scheme is bad under Article 14 of the Constitution because it is discriminatory.

In our opinion, there is no substance in any one of these contentions. It cannot be asserted that the powers entrusted to the Central Government to bring within the purview of the Act such establishments or class of establishments as the Government may by notification in the Official Gazette specify is uncontrolled and uncanalised. The whole Act is directed to institute provident funds for the benefit of employees in factories and other establishments, as the Preamble indicates. The institution of provident fund for employees is too well-established to admit of any doubt about its utility as a measure of social justice. The underlying idea behind the provisions of the Act is to bring all kinds of employees within its fold as and when the Central Government might think fit, after reviewing the circumstances of each class of establishments. Schedule I to the Act contains a list of a large variety of industries engaged in the manufacture of diverse commodities, mentioned therein. To all establishments which are factories engaged in the industries enumerated in Schedule I, the Act has been made applicable of its own force, subject to the provisions of section 16, which has indicated the establishments to which the Act shall

not apply. The Schedule is liable to be added to or modified so as to include other categories of industries not already included in Schedule I. So far as establishments which do not come within the description of factories engaged in industries, the Central Government has been vested with the power of specifying such establishments or class of establishments, as it might determine, to be brought within the purview of the Act. The Act has given sufficient indication of the policy underlying its provisions, namely, that it shall apply to all factories engaged in any kind of industry and to all other establishments employing 20 or more persons. This Court has repeatedly laid it down that where the discretion to apply the provisions of a particular statute is left with Government, it will be presumed that the discretion so vested in such a high authority will not be abused. The Government is in a position to have all the relevant and necessary information in relation to each kind of establishment enabling it to determine which of such establishments can bear the additional burden of making contribution by way of provident fund for the benefit of its employees. The power to exempt given to the appropriate Government under section 17 is not uncanalised because both clauses (a) and (b) of that section postulate that the exemption would be granted on the ground that the employees of those establishments are already in the enjoyment of benefits in the nature of provident fund, pension or gratuity not less favourable to them than under the Act. Sub-section (3) of section 1 lays down the general rule in these terms as regards the applicability of the Act :

“(3) Subject to the provisions contained in section 16, it applies—

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed, and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf: Provided that the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provision of this Act to any establishment employing such number of persons less than twenty as may be specified in the notification.”

The term ‘industry’ used in the sub-section, quoted above, is defined in section 2 (i), as follows :

“‘industry’ means any industry specified in Schedule I, and includes any other industry added to the Schedule by notification under section 4”.

By section 4, the Central Government has been authorised to add to the Schedule any other industry in respect of the employees whereof it is of opinion that a provident fund scheme should be framed under the Act, and when such a notification is issued, the industry so added shall be deemed to be an industry specified in the Schedule. The general rule as to the application of the Act has been laid down in that sub-section. By way of exception to that general rule, the appropriate Government has been authorised by section 17 to exempt from the operation of all or any of the provisions of any scheme framed under the Act. The scheme is to be framed by the Central Government, under section 5, for the establishment of provident fund under the Act for employees or any class of employees, in pursuance of the provisions of the Act. And the scheme in question in this case, as already indicated, has actually been framed and is under challenge in this case. The relevant provisions of section 17 are in these words :

“17. *Power to exempt.*—(1) The appropriate Government may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt from the operation of all or any of the provisions of any Scheme—

(a) any establishment to which this Act applies if, in the opinion of the appropriate Government, the rules of its provident fund with respect to the rates of contribution are not less favourable than those specified in section 6 and the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under this Act or any Scheme in relation to the employees in any other establishment of a similar character ; or

(c) any establishment if the employees of such establishment are in enjoyment of benefits in the nature of provident fund, pension or gratuity and the appropriate Government is of opinion that such benefits, separately or jointly are on the whole not less favourable to such employees than the benefits provided under this Act or any scheme in relation to employees in any other establishment of a similar character.”

It would appear from the terms of the relevant portion of section 17 that the exemption to be granted by the appropriate Government is not in the nature of completely absolving the establishments from all liability to provide the facilities contemplated by the Act. The exemptions are to be granted by the appropriate Government only if in its opinion the exempted establishment has provisions made for provident fund, in terms at least equal to, if not more favourable to its employees. In other words, the exemption is with a view to avoiding duplication and permitting the employees concerned the benefit of the pre-existing scheme, which presumably has been working satisfactorily, so that the exemption is not meant to deprive the employees concerned of the benefit of a provident fund but to ensure to them the continuance of the benefit which at least is not in terms less favourable to them. As the whole scheme of provident fund is intended for the benefit of employees, section 17 only saves pre-existing schemes of provident fund pertaining to particular establishments. Hence, the provisions of sub-section (3) of section 1, read along with those of section 17, quoted above, cannot be said to have conferred uncontrolled and uncanalised power on the appropriate Government. In this connection, the decision of this Court in *The Edward Mills Co., Ltd., Beawar v. The State of Ajmer*¹ may be referred to. In that case, the provisions of section 27 of the Minimum Wages Act (XI of 1948) were questioned as having given uncanalised power. The provisions of that Act run more or less on parallel lines to those of the Act impugned in this case. The Schedule attached to the Minimum Wages Act gave a list of the employments in respect of which minimum wages were to be fixed. Under section 27 of that Act, power had been given to the "appropriate Government" to add to the Schedule any employment in respect of which it was of the opinion that minimum wages should be fixed. Those provisions were attacked as lacking in legislative policy according to which a particular employment shall be chosen for being included in the Schedule. The contention in that case that no principles had been prescribed and no standards laid down which could furnish an intelligent guide to the executive authority in making the selection of employments was repelled by this Court. A similar question was raised in this Court in the case of *Vasantlal Maganbhai Sanjanwala v. The State of Bombay*², challenging the vires of section 6 (2) of the Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), which read as follows :

"The Provincial Government may, by notification in the Official Gazette, fix a lower rate of the maximum rent payable by the tenants of lands situate in any particular area or may fix such rate on any other suitable basis as it thinks fit."

This Court, on a consideration of the Preamble of the statute and its relevant provisions came to the conclusion that the power delegated to the Provincial Government by section 6 (2) was not vitiated by excessive delegation. It will be noticed that the terms of the section quoted above had given much wider powers to the Executive. But the Court pointed out that the Legislature enunciated its policy and laid down the principle for the guidance of the delegate in clear terms, and that, therefore, the impugned provisions of the Act in that case did not suffer from the vice of excessive delegation.

But strong reliance was placed on behalf of the petitioners on the decision of this Court in *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi v. Union of India*³. In that case the provisions of clause (d) of section 3 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 (XXI of 1954) were struck down as having conferred uncanalised and uncontrolled power on the Executive. In that case, the whole Act had been challenged as having infringed the fundamental rights of a citizen under Article 19 (1) (a) and (g). This Court upheld the constitutionality of the Act as a whole, in view of the scope and object of the Act, which was not to interfere with the right of freedom of speech but had reference to trade and business. This Court held that the provisions attacked on those grounds were

1. (1955) S.C.J. 42 : (1955) 1 M.L.J. (S.C.)
1 : (1955) 1 S.C.R. 735.

2. (1961) 1 S.C.J. 394 : (1961) 1 S.C.R. 341.

3. (1960) S.C.J. 611 : (1960) 2 M.L.J. (S.C.)
1 : (1960) 2 An.W.R. (S.C.) 1 : (1960) 2 S.C.R.
671.

reasonable restrictions on the rights of a citizen to carry on any trade or business. But this Court held further that the words "or any other disease or condition which may be specified in the Rules made under this Act" in clause (d) of section 3, which empowered the Central Government to add to the list of diseases falling within the mischief of section 3, suffered from the vice of excessive delegation. This Court struck down that portion of the sub-section as, in its opinion, the words impugned were vague and Parliament had not established any criteria nor laid down any standards nor prescribed any principle on which a particular disease or condition was to be specified in the Schedule. It is clear that the last mentioned case illustrates the rule that the question whether or not a particular piece of legislation suffers from the vice of excessive delegation must be determined with reference to the facts and circumstances in the background of which the provisions of the statute impugned had been enacted. If, on a review of all the facts and circumstances and of the relevant provisions of the statute, the Court is in a position to say that the Legislature had clearly indicated the underlying principle of the legislation and laid down criteria and proper standards but had left the application of those principles and standards to individual cases in the hands of the Executive, it cannot be said that there was excessive delegation of powers by the Legislature. On the other hand, if a review of all those facts and circumstances and the provisions of the statute, including the Preamble, leaves the Court guessing as to the principles and standards, then the delegate has been entrusted not with the mere function of applying the law to individual cases, but with a substantial portion of legislative power itself. Applying those principles which are now well-established by quite a number of decisions of this Court, can it be said in the instant case that the Legislature had not indicated clearly the principles underlying the legislation and the standards to be applied? In our opinion, the answer must be an emphatic "No".

It was next contended that the Act was intended by Parliament to apply to employees who were mere wage-earners and not to salaried servants, and that in the instant case, the employees of the petitioners were not mere wage-earners. It is a little difficult to appreciate the distinction sought to be made. Both 'Salary' and 'Wages' are emoluments paid to an employee by way of recompense for his labour. Neither of the two terms is a 'term of art'. The Act has not defined wages; it has only defined "Basic wages" as all emoluments which are earned by an employee while on duty or on leave with wages in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include.... (Section 2 (b).) (Exclusions are not relevant for our present purposes and; therefore, need not be read). 'Salary', on the other hand, is remuneration paid to an employee whose period of engagement is more or less permanent in character, for other than manual or relatively unskilled labour. The distinction between skilled and unskilled labour itself is not very definite and it cannot be argued, nor has it been argued, that the remuneration for skilled labour is not 'Wages'. The Act itself has not made any distinction between 'Wages' and 'Salary'. Both may be paid weekly, fortnightly or monthly, though remuneration for the day's work is not ordinarily termed 'Salary'. Simply because wages for the month run into hundreds, as they very often do now, would not mean that the employee is not earning wages, properly so called. A clerk in an office may earn much less than the monthly wages of a skilled labourer. Ordinarily he is said to earn his salary. But, in principle, there is no difference between the two. It is, therefore, not established that the Act was not intended to apply to salaried employees, if by salary is meant fortnightly or monthly wages running into hundreds per month. It is manifest that there is no force in this contention.

It now remains to consider the third and the last contention raised on behalf of the petitioners, namely, that the Act suffers from the vice of discrimination and, therefore, infringes Article 14 of the Constitution. It is even more difficult to understand this contention, because, as already pointed out, the Act applies to all establishments, except those recited in section 16 which before its amendment by Act XLVI of 1960, exempted establishments belonging to Govern-

ment or to a local authority. But whatever vice there may have been in that provision has been removed by amending the section, which stands after the amendment as under :

"16. (1) This Act shall not apply—

(a) to any establishment registered under the Co-operative Societies Act, 1912, or under any other law for the time being in force in any State relating to Co-operative Societies employing less than fifty persons and working without the aid of power ; or

(b) to any other establishment employing fifty or more persons or twenty or more but less than fifty persons until the expiry of three years in the case of the former and five years in the case of the latter, from the date on which the establishment is or has been set up.

Explanation.—For the removal of doubt it is hereby declared that an establishment shall not be deemed to be newly set up merely by reason of a change in its location."

Clause (a) of section 16, as it now stands, has exempted establishments registered under the Co-operative Societies Act, because it is well-known that it is the settled policy of the Government to foster Co-operative Societies with a view to their development and growth in the interest of the community. It is not necessary to cite instances where this Court has held that Co-operative Societies stand on a special footing which distinguishes them from other establishments or corporations. Clause (b) has reference to establishments which have been in existence for less than 3 years or 5 years, as the case may be. That is an understandable classification with a view to save newly started establishments from the additional burden of making contribution to Provident Fund in respect of its employees. It is clear that that exemption is a short-lived one because with the efflux of 3 or 5 years' period, they will automatically come under the scheme framed under the Act. The operation of section 17 has already been discussed, and it has already been indicated that an establishment coming under the exemptions granted or to be granted under section 17 does not mean that the establishment bears less burden of its share of contribution to the fund. It has not been contended before us that the petitioners' establishment does not come within the general rule laid down in section 1 (3) of the Act or within the scope of the scheme framed under section 5. It is equally clear that all hotels and restaurants come within the scope of the notification impugned in this case. Hence, there is absolutely no reason for complaint that the petitioners' establishment of that class has been chosen for hostile discrimination.

As all the contentions raised on behalf of the petitioners fail, the petition is dismissed with costs.

V.S.

Petition dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, A. K. SARKAR AND K. N. WANCHOO, JJ.

French Motor Car Co., Ltd.

.. *Appellant**

v.

The Workmen

.. *Respondents.*

Industrial Disputes—Wage scales—Revision of—Workshop employees, clerical and subordinate staff—Wage structure—Principle of Industry-cum-Region basis—Wage scales—Adjustments in—Principles.

Employees' Provident Fund Act (XIX of 1952)—Provident fund—Contribution by Management—Rate.

It is now well-settled that the principle of industry-cum-region has to be applied by an industrial Court, when it proceeds to consider questions like wage structure, dearness allowance and similar conditions of service. In applying that principle industrial Courts have to compare wage scales prevailing in similar concerns in the region with which it is dealing, and generally speaking similar concerns would be those in the same line of business as the concern with respect to which the dispute is under consideration. Further, even in the same line of business, it would not be proper to compare for example a small struggling concern with a large flourishing concern.

In fixing the wage structure for workshop employees in particular, the tribunal has taken into account for purposes of comparison concerns which are in a different line of business altogether and which are also very much bigger concerns than the appellant company. It is obvious that the fixing of wage scales for workshop employees made by the tribunal has been affected by taking into account these concerns, and to that extent the award cannot be upheld. Where a concern is paying the highest wages in a particular line of business, there should be greater emphasis on the region part of the industry-cum-region principle, though it would be the duty of the industrial Court to see that for purposes of comparison such other industries in the region are taken into account as are nearly similar to the concern before it as possible. Though, therefore, in a case where a particular concern is already paying the highest wages in its own line of business the industrial Courts would be justified in looking at wages paid in that region in other lines of business, it should take care to see that the concerns from other lines of business taken into account are such as are as nearly similar as possible to the line of business carried on by the concern before it. It should also take care to see that such concerns are not so disproportionate ately large as to afford no proper basis for comparison. The wage structure fixed by the tribunal so far as workshop employees are concerned cannot be up-held and must be set aside and the matter remanded to the tribunal for fixing proper wage scales.

There is however difference between workshop employees on the one hand and clerical and subordinate staff on the other, for workshop employees generally require a particular skill which is peculiar to the particular industry, while the same cannot be said to a great extent with respect to the clerical and subordinate staff. In these cases it may be possible to take into account even those concerns which are engaged in entirely different lines of business, for the work of employees of this class is more or less similar in all concerns.

The tribunal increased the provident fund contribution by the Management to eight per centum on the ground that that percentage was recommended by a technical committee. This part of the award must be set aside and the rate of provident fund contribution so far as the appellant company is concerned should remain at 64 per centum of the gross earnings, (i.e., basic pay plus dearness allowance) as at present.

Generally adjustments are granted when scales of wages are fixed for the first time. But there is nothing in law to prevent the tribunal from granting adjustment even in cases where previously pay scales were in existence; but that has to be done sparingly taking into consideration the facts and circumstances of each case. The usual reason for granting adjustment even where wage scales were formerly in existence is that the increments provided in the former wage scales were particularly low and therefore justice required that adjustment should be granted a second time. All that should be reasonably provided in the matter of adjustment is that when an employee is brought on to the new scale his pay should be stepped up to the next step in the new scale in case there is no such pay in the new scale. Nor a case has been made out for granting adjustments even when a comparatively generous rate of increment was in force in this company previously and the company was paying the highest wages in its own line of business. The order as to adjustment should be modified.

Appeal by Special Leave from the Award Part I dated the 23rd December, 1961, of the Industrial Tribunal, Maharashtra in Reference (IT) No. 127 of 1960.

C. K. Daphtary, Solicitor-General of India (*J. B. Dadachanji, G. C. Mathur and Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*), for Appellant.

R. J. Mehta, Secretary, Engineering Mazdoor Sabha, for Respondents.

The Judgment of the Court was delivered by

Wanchoo J.—This appeal by Special Leave arises out of an industrial dispute between the appellant, Messrs. French Motor Car Co., Limited, and their workmen, who are the respondents before us. Four matters were referred for adjudication by the Government of Maharashtra under section 10 of the Industrial Disputes Act, XIV of 1947, to the Industrial Tribunal, Maharashtra. Of these we are concerned in the present appeal with (i) wages and scales of pay for clerical staff, workshop employees and subordinate staff, (ii) dearness allowance for clerical staff, and (iii) provident fund.

The case of the respondents was that the appellant company was in a very flourishing condition and therefore the wage-scales should be revised. The appellant did not contend that its financial position was not good enough to bear an increased burden; it, however, contended that the wage scales had been revised only a few years before and there was no ground for further revision so soon thereafter. The tribunal went into the financial capacity of the appellant to bear an increased burden of wage scales and found that its finances would be able to bear the burden which it was going to put on it by revision of wage scales. It also went into the history of the appellant company to consider whether a case had been made out for further revision of wages. That history shows that for the first time in 1948

there was an agreement between the appellant and its workmen by which scales of wages were fixed. Soon thereafter an award was made by another tribunal in the case of United Motors (India), Limited, which is a concern carrying on similar business as the appellant and much higher wage scales were found to exist in that concern and were confirmed by the award. These higher scales were later adopted by two other similar concerns in Bombay, namely, Dadajee Dhakjee and Metro Motors. Then followed another dispute between the appellant and its workmen in 1953 with respect to wage scales and an award was made by which practically the same wage scales were prescribed as in the other three concerns, with respect to workshop employees and subordinate staff. Then in 1954 there was another agreement between the appellant and its workmen for fixing wage scales for clerical staff. The present dispute started in 1958, and eventually reference was made by the Government of Maharashtra in 1960, and the contention of the appellant was that there was no reason to revise so soon the wage scales, which are expected to be a long-term arrangement. The tribunal has, however, pointed out that there has been a large increase in the cost of living since 1955 and the cost of living index number for workmen had gone up from 338 in 1955 to 420 in 1960. It had gone to 428 in 1961 when the award was made. In view of this change in economic conditions the tribunal was of the opinion that a case had been made out for a further revision of wage scales, particularly as the dearness allowance was also revised in 1954 by agreement and the effect of that was to reduce the dearness allowance. We see no reason in these circumstances to disagree with the view of the tribunal that a case has been made out for revising the wage structure.

The main contention on behalf of the appellant is that wages are fixed on industry-cum-region basis and the tribunal went wrong when it took into account for comparison industrial concerns which were entirely dissimilar to the appellant's. It is now well-settled that the principle of industry-cum-region has to be applied by an industrial Court, when it proceeds to consider questions like wage structure, dearness allowance and similar conditions of service. In applying that principle industrial Courts have to compare wage scales prevailing in similar concerns in the region with which it is dealing, and generally speaking similar concerns would be those in the same line of business as the concern with respect to which the dispute is under consideration. Further, even in the same line of business, it would not be proper to compare (for example) a small struggling concern with a large flourishing concern. In *Williamsons (India) Private, Ltd. v. The workmen*¹, this Court had to consider this aspect of the matter, where *Williamsons Private, Limited* was compared by the tribunal with *Messrs. Gilanders Arbuthnot & Company* for purposes of wage fixation, and it was observed that the extent of the business carried on by the concerns, the capital invested by them, the profits made by them, the nature of the business carried on by them, their standing, the strength of their labour force, the presence or absence and the extent of reserves, the dividends declared by them and the prospects about the future of their business and other relevant factors have to be borne in mind for the purpose of comparison. These observations were made to show how comparison should be made, even in the same line of business and were intended to lay down that a small concern cannot be compared even in the same line of business with a large concern. Thus where there is a large disparity between the two concerns in the same business, it would not be safe to fix the same wage structure as in the large concern without any other consideration. The question whether there is large disparity between two concerns is, however, always a question of fact and it is not necessary for the purposes of comparison that the two concerns must be exactly equal in all respects. All that the tribunal has to see is that the disparity is not so large as to make the comparison unreal. In *Novex Dry Cleaners v. Workmen*², this Court pointed out that it would not be safe to compare a comparatively small concern with a large concern in the same line of business and impose a wage structure prevailing in the large concern as a rule of thumb without

1. (1962) 1 L.L.J. 302.

2. (1962) 1 L.L.J. 271.

considering the standing, the extent of labour force, the extent of business and the extent of profits made by the two concerns over a number of years.

The contention on behalf of the appellant is that in fixing the wage structure for workshop employees in particular, the tribunal has taken into account for purposes of comparison concerns which are in a different line of business altogether and which are also very much bigger concerns than the appellant company. There is in our opinion force in this contention. In dealing with the workshop employees, the tribunal has taken into account wages prevalent in concerns like Greaves Cotton and Dumex, which are very much larger concerns than the appellant company and which are also not in the same line of business. It is obvious that the fixing of wage scales for workshop employees made by the tribunal has been affected by taking into account these concerns, and to that extent the award cannot be upheld. At the same time it appears that the appellant company is practically paying the highest wage scales in the particular line of business in which it is engaged, and it is urged on its behalf that if it is compared with concerns in its own line of business, there would be no justification for increasing the wage scales for it is already paying the highest scales in that line of business. We are of opinion that this argument cannot be accepted, for it would then mean that if a concern is paying the highest wages in a particular line of business, there can be no increase in wages in that concern whatever may be the economic conditions prevailing at the time of dispute. It seems to us, therefore, that where a concern is paying the highest wages in a particular line of business, there should be greater emphasis on the region part of the industry-cum-region principle, though it would be the duty of the industrial Court to see that for purposes of comparison such other industries in the region are taken into account as are as nearly similar to the concern before it as possible. Though, therefore, in a case where a particular concern is already paying the highest wages in its own line of business, the industrial Courts would be justified in looking at wages paid in that region in other lines of business, it should take care to see that the concerns from other lines of business taken into account are such as are as nearly similar as possible, to the line of business carried on by the concern before it. It should also take care to see that such concerns are not so disproportionately large as to afford no proper basis for comparison. In the present case even though the tribunal had justification to go beyond the concerns in the particular industry in which the appellant company is engaged for purposes of comparison, because the appellant is already practically paying the highest wages in that line of business, it was not right for the tribunal to take for comparison concerns like Dumex and Greaves Cotton which are in completely different and dissimilar lines of business and also so disproportionately larger than the appellant company as not to afford a proper basis of comparison. We are therefore of opinion that the wage structure fixed by the tribunal so far as workshop employees are concerned cannot be upheld and must be set aside. In the circumstances the award with respect to the workshop employees is set aside and the matter remanded to the tribunal to fix proper wage scales in the light of the observation made by us.

It appears that evidence was given before the tribunal for purposes of comparison of concerns which were in the line of business nearly similar to the business carried on by the appellant company. Consequently, it would not be necessary to take fresh evidence on the point and the tribunal should proceed to fix the wage structure afresh after excluding for purposes of comparison concerns in absolutely different lines of business and also concerns which are disproportionately larger than the appellant company.

Turning now to the wage scales for clerical and subordinate staff, the argument on behalf of the appellant is the same, *viz.*, that the tribunal has taken for comparison concerns which were really not comparable. There is however difference between workshop employees on the one hand and clerical and subordinate staff on the other, for workshop employees generally require a particular skill which is peculiar to the particular industry, while the same cannot be said to a great extent with respect to the clerical and subordinate staff. A somewhat similar question was

considered by this Court in *Messrs. Lipton Limited and another v. Their Employees*.¹ In that case the tribunal was considering the question of wage fixation for clerical and subordinate staff, and the argument on behalf of the employer was that there was no reliable evidence to show that in any comparable industry in the same region the wages were higher and therefore the wage structure in the particular case required revision. The employer concerned in that case was Messrs. Lipton, Limited, carrying on tea business as merchants in Delhi. Evidence was given by the workmen in that case about the scales of pay of employees in the Delhi office of a number of other concerns like, the Standard Vacuum Oil Company, Thomas Cook (Continental) Overseas, Burmah Shell, Lever Brothers (India), Limited, and Associated Companies and Marshall Sons & Company (India), Limited. But it was contended on behalf of the employer that these were not comparable concerns. Some were oil concerns and some engineering and some manufacturing concerns. The workmen however, contended that so far as drivers, sweepers, peons, clerks, godown keepers, typists, stenographers, and the like were concerned, the nature of their work was the same in all the aforesaid concerns which were relied on for comparison, and therefore it could not be said, as urged by the employer, that there was no evidence of comparable concerns. This Court observed in that connection that it was impossible to say that there was no evidence on which the tribunal could proceed to revise the wage structure and that on the contrary there was evidence which justified a revision of the wage structure. In effect this decision means that in case of employees of the class mentioned therein it may be possible to take into account even those concerns which are engaged in entirely different lines of business for the work of employees of this class is more or less similar in all concerns. We are in agreement with this view and the argument therefore urged on behalf of the appellant company cannot prevail so far as clerical and subordinate staff are concerned.

It appears however that a mistake has been made by the tribunal in respect of subordinate staff. The subordinate staff in the appellant company consists of drivers, watchmen, peons, cleaners and sweepers. According to the system prevailing in the company, drivers and watchmen stood by themselves and had separate scales. Peons, cleaners and sweepers were however in the same scale and were treated similarly in this company. What the tribunal has done is to prescribe one scale for drivers, another for watchmen, peons and cleaners and a third for sweepers, thus disturbing the system prevailing in the appellant company without any reason given for it. It appears that the tribunal made a mistake inadvertently when it said that in this company the scales of watchmen, peons and cleaners had been uniform. That was in fact not so and the respondent's counsel also fairly admits it. In the circumstances we direct that the order of the tribunal fixing the scale of 50-3-77-4-85 for watchmen, peons and cleaners will only apply to watchmen and not to peons and cleaners. We also order that the scale of 40-2-58-3-73 will apply not only to sweepers but also to peons and cleaners. The appeal therefore with respect to clerical staff and subordinate staff must fail except as to the modification pointed out above.

We now come to dearness allowance for clerical staff. We have already indicated that dearness allowance was revised by agreement in 1954 with respect to clerical staff, and the revision resulted in reduction. What the tribunal has done is to set aside the agreement of 1954 and to bring back the system of dearness allowance prevailing before that agreement. In the circumstances we cannot see how the system now introduced by the tribunal which is also more in consonance with the pattern of dearness allowance prevailing in Bombay and which was in force in the appellant company itself before 1954 can be successfully challenged. We therefore reject the contention of the appellant in this behalf.

We now come to provident fund. It appears that in this company there is a scheme of gratuity as well as provident fund. Originally, the rate of provident

1. (1959) S.C.J. 772 : (1959) M.L.J. (Cri.) 571 : (1959) Supp. (2) S.C.R. 150.

fund contribution in this company was $8\frac{1}{2}$ per centum of the basic pay but from 1st July, 1960 the rate has been changed to $6\frac{1}{4}$ per centum of the gross earning, i.e., basic pay plus dearness allowance, on the application of the Employees Provident Funds Act (XIX of 1952) and the Employees Provident Funds Scheme, 1952, to this industry. What the tribunal has done is to fix the contribution at 8 per centum of the gross earnings (i.e., basic pay plus dearness allowance) instead of the present rate of $6\frac{1}{4}$ per centum. This has been done on the sole ground that a technical committee had reported sometime before the tribunal made its award that the rate should be raised to eight per centum of the gross earnings (i.e., basic pay plus dearness allowance). The tribunal therefore increased the provident fund contribution to eight per centum on the ground that that percentage was recommended by the technical committee after a thorough study of the problem from all points of view and it should be adopted by well established and prosperous concerns like the appellant, though the tribunal was not unaware of the fact that this was not the rate generally prevalent in that region. It is urged on behalf of the respondents that legislation is under contemplation in this respect; but the fact remains that no law has so far been made making any change in the rate of contribution. We see no reason why simply because some recommendation, which is still to be implemented, has been made by a Committee, that the contribution should be increased to eight per centum in the case of the appellant company only, when the general rate is only $6\frac{1}{4}$ per centum. In the circumstances this part of the award must be set aside and the rate of provident fund contribution so far as the appellant company is concerned should remain at $6\frac{1}{4}$ per centum of the gross earnings (i.e., basic pay plus dearness allowance) as at present.

We now come to the question of adjustment. The contention on behalf of the appellant is that when wage scales were introduced in the appellant company, they were granted on a generous scale and there was therefore no reason for adjustment in the manner in which the tribunal has done in this case, for it is not usual to grant adjustment where wage scales already existed, though adjustment is granted when wage scales are fixed for the first time by tribunals. On the other hand, it is contended on behalf of the respondents that industrial tribunals have been granting adjustments even where wage scales existed formerly and that the grant of adjustment is not limited to those cases where wage scales are being introduced for the first time. In this connection, reliance was placed on behalf of the respondents on a number of awards which were listed in Exhibit U-15. We asked parties to give an agreed statement as to what these awards provided in the matter of adjustment and whether they showed that adjustment had been granted by industrial tribunals even where there were wage scales from before. Such an agreed statement has been filed. The large majority of the awards listed in Exhibit U-15 show that they are cases where wage scales were being fixed for the first time and adjustment was therefore granted whether point to point or in such other manner as the tribunals considered just on the facts and circumstances of each case. In some of the cases, however, it appears that adjustment was granted even though there were previous scales of pay in existence. The ground for such grant of adjustment seems to have been that the previous scales were found to be low and the increments prescribed thereunder were particularly low. In those circumstances, the tribunal was of the view that adjustment should be granted even though there had been previous scales of pay.

A review therefore of the cases cited on behalf of the respondents shows that generally adjustments are granted when scales of wages are fixed for the first time. But there is nothing in law to prevent the tribunal from granting adjustment even in cases where previously pay scales were in existence; but that has to be done sparingly taking into consideration the facts and circumstances of each case. The usual reason for granting adjustment even where wage scales were formerly in existence is that the increments provided in the former wage scales were particularly low and therefore justice required that adjustment should be granted a second time. In the present case, however, grades of pay for clerical staff which were existing

previously provided increments from Rs. 5 to Rs. 10 per year, which was in accordance with the rate of increments prevailing generally in the region for such staff. Further in the case of unskilled workshop employees and subordinate staff the previous rate of increment in the appellant company was comparatively on a generous scale as compared to even such companies as Dumex Private, Limited and Greaves Cotton Company. The same could be said of the semi-skilled grade and even of the skilled grade previously in force in this company. In the circumstances, it seems to us that there is no justification for adjustment in the manner provided by the tribunal when new scales are fixed in the present case, and all that should be reasonably provided in the matter of adjustment is that when an employee is brought on to the new scale his pay should be stepped up to the next step in the new scale in case there is no such pay in the new scale. We ought to add that in making the order of adjustment the tribunal did not consider the merits of the rival contentions from this aspect. In a case of this kind we do not think that adjustment should have been ordered almost as a matter of course. Nor have the respondents satisfied us that a case has been made out for granting adjustments even when a comparatively generous rate of increment was in force in this company previously and the company was paying the highest wages in its own line of business. We are therefore of opinion that the order as to adjustment should be modified as above.

The last point is with respect to classification. So far as that is concerned, the parties agreed that after the publication of Part I of the award the company will classify its employees and send its classification to the Sabha (*i.e.*, the Union). The Sabha will then file its objection if any and finally the disputed cases will be decided by the tribunal. The tribunal therefore did not go into the question of classification when it gave the award under appeal, though there are some observations in the award which appear to have some bearing on the question of classification. However, in view of the fact that the tribunal has not gone into the question of classification at this stage any tentative observations made by it would not affect the agreement between the parties, *viz.*, that the employees will in the first instance be classified by the appellant company and the classification will be sent to the union which will have the right to object and thereafter the disputed cases will be decided by the tribunal. In view of this agreement no question of classification arises at the present stage.

We therefore partly allow the appeal and set aside the order of the tribunal with respect to workshop employees and remand the case for fixing their wages in the light of the observations made by us in this judgment. We also set aside the order with respect to provident fund and reduce the contribution to $6\frac{1}{4}$ per centum. We also set aside the order as to adjustment which shall be carried out hereafter in the manner provided in this judgment.

The appeal as regards salary in the case of clerical staff and subordinate staff (except for the modification re: subordinate staff), and dearness allowance to the clerical staff fails and is hereby dismissed. We may add that the new scales of pay to be fixed on remand shall take effect from 1st July, 1960, as already ordered in the present award. In the circumstances the parties will bear their own costs.

V.S.

Ordered accordingly

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, J. L. KAPUR, A. K. SARKAR, M. HIDAYATULLAH AND RAGHUBAR DAYAL, JJ.

Raja V. V. Muvva Gopala Krishna Yachendra and others ... Appellants*.

v.

Rajah V. V. S. K. Krishna Yachendra and others ... Respondents.

Madras Estates, (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—Distribution of the advance payment of compensation and the interim payment—Section 45 of the Act—If ultra vires the State Legislature and violative of Article 14 of the Constitution of India (1950).

What is to be distributed between the various persons entitled to the compensation is the amount of compensation deposited i.e., the amount of compensation minus the permissible deductions including peishkush.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) does not deal with the succession to impartible estates. The Act acquires the impartible estate which vests in the Government on the notified date. The Act was enacted by the State Legislature by virtue of Item No. 9, List II, Seventh Schedule to the Government of India Act which reads "Compulsory acquisition of land." The Act is not *ultra vires* the State Legislature.

The attack on the validity of section 45 of the Act on the ground of its contravening the provisions of Article 14 of the Constitution of India (1950) is not open to the appellants in view of Article 31-B which provides *inter alia* that none of the Acts specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void or ever to have become void on the ground that the Act takes away or abridges any of the rights conferred by any provisions of Part III (Article 14 is in that part) of the Constitution. The provisions of section 45 of the Act are therefore not void.

Whatever be the nature of compensation payable, the distribution of the compensation between the persons who had an interest in the estate would be in accordance with the provisions of sub-section (2) of section 45 of the Act.

Appeals by Special Leave from the Judgment and Decrees dated the 4th March, 1955 of the former Andhra High Court at Guntur, in S.T. Appeals Nos. 83, 85, to 88, 90, 91, and 119-121 of 1954.

M. C. Setalvad, Attorney-General for India (*R. Ganapathy Iyer* and *V. Sureshan*, Advocates and *G. Gopalakrishnan*, Advocate of *M/s. Gagrati & Co.*, with him), for Appellants (In C. As. Nos. 116 to 119 of 1961) and Respondents (In C.As. Nos. 120 to 125 of 1961).

A. V. Viswanatha Sastri, Senior Advocate (*Vedantachari* and *T. V. R. Tatachari*, Advocates with him), for Respondents 1 to 5 (In C.As. No. 116 of 1961) and Respondent No. 1 (In C.As. Nos. 117 to 119 of 1961) and Appellants (In C.As. Nos. 120 to 125 of 1961).

K. Bhimasankaram, Senior Advocate (*P. D. Menon*, Advocate with him), for Respondent No. 2 (In C.As. Nos. 117 to 119 of 1961).

The Judgment of the Court was delivered by

Raghubar Dayal, J.—These appeals arise out of the order of the Tribunal appointed under section 8 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948), hereinafter called the Act, apportioning the advance compensation given and interim payments made in connection with the vesting of the Venkatagiri Estate in the Government of Madras as a result of a notification issued under sub-section (4) of section 1 of the Act from the notified date, i.e., 7th September, 1949.

The Act received the assent of the Governor-General on 2nd April, 1949 and some of its sections, including sections 4 and 8, mentioned in sub-section (4) of section 1, came into force at once. The other sections came into force with respect to the Venkatagiri Estate from the notified date. With effect from the notified

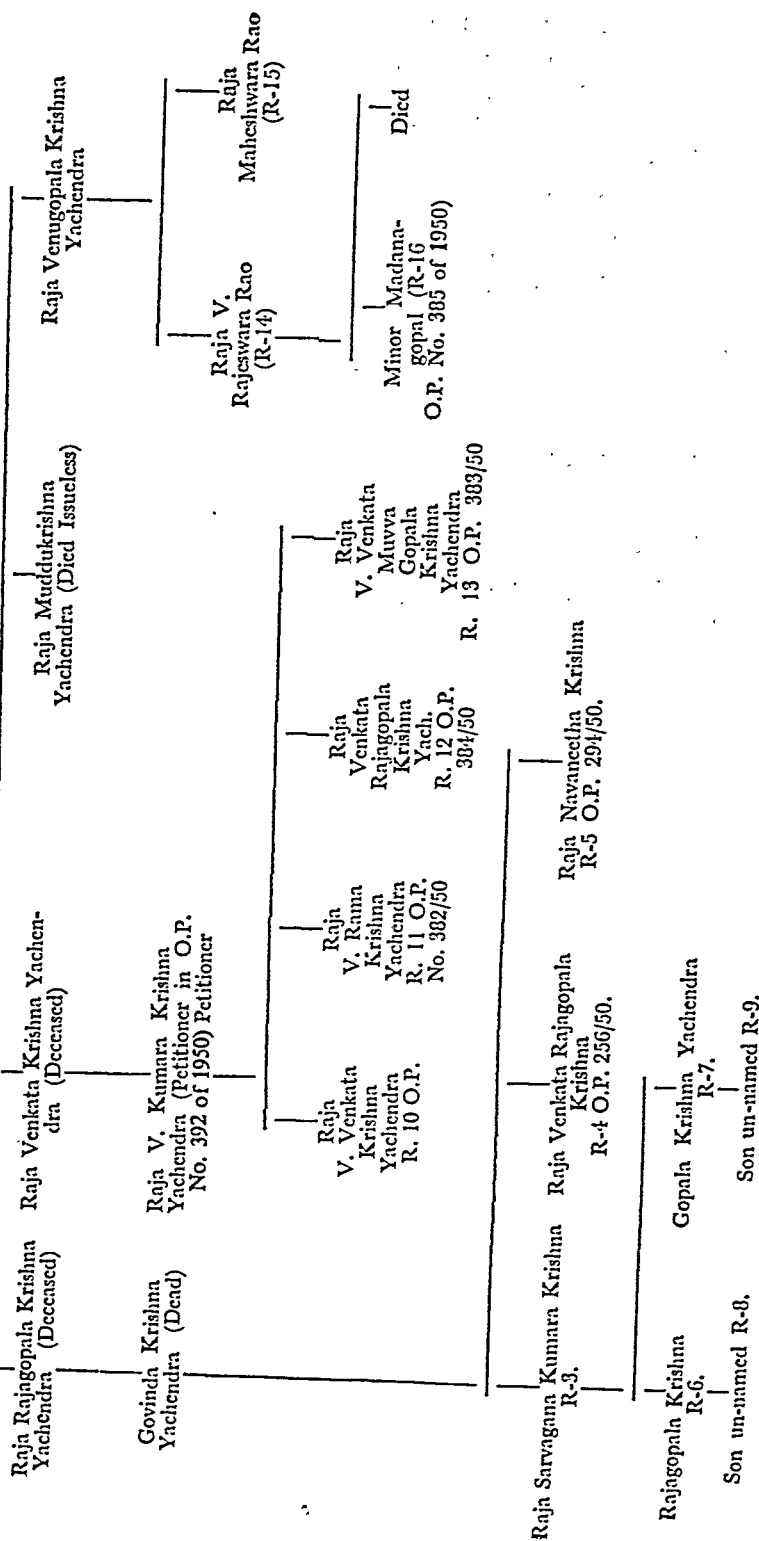
date, *i.e.*, 7th September, 1949, the entire Venkatagiri Estate stood transferred to the Government and vested in it by reason of section 3 (b) of the Act.

Section 39 provides for the Director of Settlements to determine the basic annual sum in respect of the estate and also the total compensation payable in respect of the estate, in accordance with the provisions of the Act. Section 54-A provides that the Government shall estimate roughly the amount of compensation payable in respect of the estate and deposit one-half of that amount within six months from the notified date in the office of the Tribunal as advance payment on account of compensation. Sub-section (2) of section 50 provides for the deposit of interim payments by the Government during the period between the notified date and the final determination and deposit of the compensation payable in respect of the estate.

It respect of the Venkatagiri Estate, the Government deposited Rs. 12,11,419 as and by way of advance payment of compensation, after deducting Rs. 7,28,500 payable to the Government by the Estate for peishkush out of the sum of Rs. 19,39,919-8-0, half of the estimated amount of compensation payable. The Government also deposited as interim payment Rs. 1,55,194 for each of the Fasli years 1359 to 1362-F. It is the distribution of these amounts in deposit as advance payment of compensation and interim payments, which is the subject-matter for determination is these appeals.

To understand the various claims for payment out of these deposits, the following genealogical table will be helpful:—(see page 344).

KUMARA YACHENDRA BAHADUR VARU



The Venkatagiri Estate is an ancient estate in North Arcot and the necessary history of the estate for the purposes of this case is contained in the document Exhibit A-1 with which we now deal. Kumara Yachendra Bahadur Varu, who tops the genealogical table noted above and his four sons mentioned therein, are parties to this document. Kumara Yachendra Bahadur Varu represents also his minor son Venugopala Krishna Yachendra. The document recites that the estate had been made over in 1878 to Rajagopala Krishna Yachendra, the eldest of the four brothers, by their father Kumara Yachendra Bahadur Varu, the then Rajah, as he wanted to devote himself to offering prayers to God for obtaining salvation. He was said to be the sole heir to the estate, as Venkatagiri Zamindari was an impartible estate and succession to it was governed by the rule of lineal primogeniture. In 1889, two of the brothers, Venkata Krishna Yachendra and Muddukrishna Yachendra expressed a desire for the partition of the estate. The then Rajah, *i.e.*, Rajagopala Krishna Yachendra, the eldest brother, asserted that it was not liable for partition. The four brothers then consulted their father and he told them :

“that the Venkatagiri Zamindari was originally acquired by the valour of our ancestors in warfare, that the Zamindari is ancient, that it is an Impartible Estate which has to pass in the order of primogeniture, that at the time when the Sannad Istimrar Mulk was given to the Raja of Venkatagiri who was ruling at the time of the permanent settlement the Peshkush was settled for this Venkatagiri Samasthanam on the amount which was being paid as tribute and on the entire expenses relating to military assistance that was to be rendered to the Nawab's Government which was in power previously that for this reason this Venkatagiri Samasthanam is not at all partible that the immovable properties relating thereto and also other immovable properties acquired with the income of the said Samasthanam are not liable for partition that this is his opinion in regard to immovable properties.....”

The father suggested partition of certain other property. The terms of the final settlement between the father and his four sons are then noted. They may be briefly mentioned :

(1) As the Venkatagiri Estate is an impartible estate and it passes to the eldest son by the rule of lineal primogeniture, the said estate, the immovable properties pertaining to it and other immovable properties acquired with the income derived from the said estate will be enjoyed by the Rajah, the eldest brother, and after his death his sons and grandsons and so on in succession shall enjoy, always the eldest male being the heir.

(2) If in the line of the said Rajah, his natural sons or adopted sons do not have male issue and that line stops short, then the properties shall be enjoyed by him who is the nearest heir and who is also the eldest to whom the impartible properties of the family pass according to law and custom and the same shall be enjoyed by his successors.

(3) The said estate, all the properties pertaining to it, the title, power privileges, all these shall be enjoyed fully and with all powers according to law and custom by the respective individuals who would be ruling at the respective periods subject to the condition of payment of allowances to other members of the family from the income derived from the estate and from the properties in a manner befitting their respective status.

(4) The allowances were settled as follows : Each of the brothers was to get Rs. 1,000 per month for the rest of his life. After the death of each of these brothers, his male heir would continue to get this allowance of Rs. 1,000 per month. This amount of Rs. 1,000 would be distributable between such male heirs and their male issues, according to Hindu Law. If the male member died without leaving a natural son or an adopted son, the allowance was to pass to the nearest agnates of the same branch according to Hindu Law and in case he left a wife or wives who had to be paid maintenance, their maintenance would be a liability on such agnate. It was further provided that if any of the three lines of the family ceased for want of male issue *i.e.*, whether natural or adopted son, then subject to the condition that the wife or wives of the surviving male member of that branch who dies last shall be paid for their lifetime as maintenance a sum of Rs. 500 being one half of the entire

allowance of Rs. 1,000 that was being paid to the said male member, the allowance which was being paid to that branch would entirely cease.

This document has been acted upon.

In 1904, the Madras Impartible Estates Act, 1904 (II of 1904) came into force. The Venkatagiri Estate was included in the Schedule of that Act and had to be deemed to be an impartible estate in view of section 3 of that Act. Section 9 of that Act mentioned the persons entitled to maintenance out of the impartible estate, where for the purpose of ascertaining the succession to the impartible estate the estate had to be regarded as the property of a joint Hindu family.

In view of section 66 of the Act the Madras Impartible Estates Act of 1904 is deemed to have been repealed in its application to the Venkatagiri Estate with effect from the notified date. The expression 'impartible estate' in the Act means an estate governed immediately before the notified date by the Madras Impartible Estates Act, 1904 and therefore applies to this estate.

Section 41 of the Act provides for the compensation to be deposited in the Office of the Tribunal. Section 42 provides for the filing of claims to the compensation before the Tribunal by persons claiming any amount by way of a share or by way of maintenance or otherwise and by creditors. By section 43, the Tribunal is to inquire into the validity of the claims and determine the persons who, in its opinion, are entitled to the compensation deposited and the amount to which each of them is entitled.

Section 44 provides that as a preliminary to the final determination, the Tribunal shall apportion the compensation among such persons whose rights or interest in the estates stood transferred to the Government, including persons who are entitled to be maintained from the estate and its income, as far as possible, in accordance with the value of their respective interests in the estate. Its sub-section (2) provides how the value of those interests shall be ascertained, and says that in case of an impartible estate referred to in section 45, the ascertainment shall be in accordance with the provisions contained in that section and in such rules, not inconsistent with that section, as may be made by the Government in that behalf. Section 45 is the main section for our purpose and may be quoted :

"45. (1) In the case of an impartible estate which had to be regarded as the property of a joint Hindu family for the purpose of ascertaining the succession thereto immediately before the notified date, the following provisions shall apply.

(2) The Tribunal shall determine the aggregate compensation payable to all the following persons, considered as a single group :—

(a) the principal landholder and his legitimate sons, grandsons, and great-grandsons in the male line living or in the womb on the notified date, including sons, grandsons and great-grandsons adopted before such date (who are hereinafter called 'sharers') ; and

(b) other persons who, immediately before the notified date, were entitled to maintenance out of the estate and its income either under section 9 or 12 of the Madras Impartible Estates Act, 1904 or under any decree or order of a Court, award, or other instrument in writing or contract or family arrangement, which is binding on the principal landholder (who are hereinafter called maintenance-holders) :

Provided that no such maintenance-holder shall be entitled to any portion of the aggregate compensation aforesaid, if, before the notified date, his claim for maintenance, or the claim of his branch of the family for maintenance, has been settled or discharged in full.

(3) The Tribunal shall next determine which creditors, if any, are lawfully entitled to have their debts paid from and out of the assets of the impartible estate and the amount of which each of them is so entitled ; and only the remainder of the aggregate compensation shall be divisible among the sharers and maintenance-holders as hereinafter provided.

(4) The portion of the aggregate compensation aforesaid payable to the maintenance-holders shall be determined by the Tribunal and notwithstanding any arrangement already made in respect of maintenance whether by a decree or order of a Court, award or other instrument in writing or contract or family arrangement, such portion shall not exceed one-fifth of the remainder referred to in sub-section (3), except in the case referred to in the Second Proviso to section 47, sub-section (2).

(5) (a) The Tribunal shall, in determining the amount of the compensation payable to the maintenance-holders and apportioning the same among them, have regard, as far as possible, to the following considerations, namely :—

- (i) the compensation payable in respect of the estate ;
- (ii) the number of persons to be maintained out of the estate ;
- (iii) the nearness of relationship of the person claiming to be maintained ;
- (iv) the other sources of income of the claimant ; and
- (v) the circumstances of the family of the claimant.

(b) For the purpose of securing (i) that the amount of compensation payable to the maintenance-holders does not exceed the limit specified in sub-section (4) and (ii) that the same is apportioned among them on an equitable basis, the Tribunal shall have power, wherever necessary, to re-open any arrangement already made in respect of maintenance, whether by a decree or order of a Court, award, or other instrument in writing, or contract or family arrangement.

(6) The balance of the aggregate compensation shall be divided among the shares, as if they owned such balance as a joint Hindu family and a partition thereof had been effected among them on the notified date."

Rajah Velugoti Kumara Krishna Yachendra, appellant in Appeal No. 117 of 1961, hereinafter called Krishna Bahadur, filed Original Petition No. 2300 of 1953 before the Tribunal. Three of his sons Ramakrishna Yachendra, Rajagopala Krishna Yachendra and Movva Gopala Krishna Yachendra, appellants in Civil Appeals Nos. 118, 119 and 116 of 1961, respectively, filed separate petitions.

By their applications they raised the contentions that they were entitled to an amount in the compensation as sharers, as the impartible estate lost its character as such from the notified date and that the compensation payable with respect to their estate became partible and that in any case, they were entitled to the amount as creditors. It was further contended that the provisions of section 45 of the Act were *ultra vires* the State Legislature and were discriminatory and so void and that the maintenance amount be determined with respect to the amount of compensation minus the amount of peishkush which was payable by the estate to the Government. None of these contentions was accepted by the Tribunal or by the Special Tribunal constituted in accordance with section 51 of the Act for hearing appeals against the orders of the Tribunal.

The Tribunal fixed Rs. 75,000 as the amount payable to Krishna Bahadur's branch out of the sum of Rs. 12,11,419 deposited as advance payment of compensation and further fixed the ratio of the value of the interests of Krishna Bahadur and the two brothers of the present Rajah, in the 1/5th of the advance compensation at 75 : 75 : 92. The amounts deposited as interim payment were to be distributed in the same ratio.

The present Rajah, Sarvagna Kumara Krishna, had urged before the Tribunal that the amount of maintenance to be paid to Krishna Bahadur's branch should be calculated on a different basis which, in brief, may be said to be that the amount to which he be held entitled out of the compensation should bear the same proportion to the total compensation as the monthly allowance payable to him under the document Exhibit A-1 bears to the income of the Estate in 1889 when that allowance of Rs. 1,000 per month was fixed. This contention also did not find favour with the Tribunal or the Special Tribunal on appeal. The Rajah has therefore filed Civil Appeals Nos. 120 to 123 of 1961. He has also filed two appeals Nos. 124 and 125 with respect to the interim payments made to Krishna Bahadur's branch for the Fasli years 1359 and 1360 which were apportioned in accordance with the same principle which the Tribunal had adopted for the distribution of the maintenance allowance out of the advance compensation.

The points urged for the appellants in Appeals Nos. 116 to 119 are :

(1) Venkatagiri Estate was impartible by custom, that impartibility, was recognized when disputes arose in 1889, that impartibility continued under the Madras Impartible Estates Act of 1904 but ceased when the Estate vested in the Government on 7th September, 1949.

(2) In these circumstances, the compensation will not bear the character of impartibility as the property became the property of the joint family, the coparcenary having continued all through;

(3) Section 45 and other provisions of the Act are *ultra vires* the State Legislature for want of legislative competence inasmuch as the said Legislature had no power to enact a law disturbing the rights of a joint family and also because the provisions of section 45 are discriminatory and offend Article 14 of the Constitution as they provide for the maintenance-holders to get 1/5th out of the compensation while the proprietor and his sons are to get 4/5ths out of it after satisfying the claims of the creditors.

(4) The appellants are not maintenance-holders, but creditors.

(5) The amount of peishkush payable by the Venkatagiri Estate to the Government was not to be deducted from the compensation when calculating the maintenance amount payable to the maintenance-holders.

Now, the amount of peishkush payable to the Government had to be deducted out of the amount to be deposited under sub-section (1) of section 54-A in view of the provisions of its sub-section (2) which provides that from the amount to be deposited under sub-section (1) the Governments shall be entitled to deduct one half of all moneys, if any, due to them in respect of peishkush. Sub-section (4) of section 54-A authorises the Tribunal after such enquiry as it thinks fit to apportion the amount deposited in pursuance of that section, among the persons mentioned in that sub-section as far as possible in accordance with the value of their respective interests and further provides that the provisions of sections 42 to 46 (both inclusive), shall apply *mutatis mutandis* in respect of the amount so deposited.

It is true that the peishkush was a payment which the holder of the Estate had to make to the Government out of the income of the estate and that any arrears of peishkush remain a liability on the estate. It was in view of this fact that section 55 (1) of the Act which takes away the right of any land-holder to collect any rent which had accrued to him from any ryot before the notified date and was outstanding on that date, empowers the manager appointed under section 6 to collect such rent and to pay the balance, if any, after making certain deductions specified in the section, including any arrears of peishkush to the landholder. The real compensation which is to be paid by the Government on the vesting of the estate must be equal to the amount of the value of the estate as such, minus the liabilities of the estate. What is to be distributed between the various persons entitled to the compensation must be the net amount and not the theoretical compensation for the estate as such. In this view of the matter too, the share of the maintenance-holders will have to be calculated in the amount of compensation deposited, *i.e.*, the amount of compensation minus the permissible deductions including peishkush.

It is therefore clear that the Tribunal could not have ignored the deduction of peishkush from one half of the estimated amount of compensation payable in respect of the estate and had to apportion the amount deposited after taking into consideration such deduction. The contention for the appellants that the amount to be considered for calculating the share of the maintenance-holders should have been taken at Rs. 19,00,000 odd and not at Rs. 12,00,000 odd, the actual amount of the deposit, is not sound.

The next question is whether the allowance is a debt owed by the Rajah-landholder to his brothers to whom the allowance was to be paid. It might have been so only if it was postulated that the Rajah had purchased the share of the other members of the family and was paying the sale price in the form of an allowance. This is not what the document Exhibit A-1 recites. There is nothing in it to indicate that the brothers of the Rajah to whom the estate had been made over by their father claimed a share in the estate after they had been told by their father that the estate was impartible. The sale price is normally fixed while the amount of allowance to be payable is an indefinite quantity depending upon the length of time through which each of the brother's branches continues to have a male member. The word 'allowance' appears to have been used either as a dignified expression preferable in form to that of 'maintenance' or due to the idea that the word 'maintenance'

is to be used appropriately only for the amounts to be paid to female members of the family in certain circumstances.

The allowance referred to in the deed, Exhibit A-1, as payable to Kishen Chander, father of Krishna Bahadur, is not akin to a debt owed by the Rajah to Kishen Chander. It is not made payable on account of certain loans taken by the Rajah, but is payable for maintenance, as the estate being impartible the other members of the family had a reasonable claim to maintenance. The only ground urged in support of the contention that the allowance is not an allowance for maintenance is that the word 'maintenance' is used in the document Exhibit A-1 in connection with the amount payable to the widows. A different terminology in referring to the amounts to be paid to Kishen Chander and his brothers does not change the character of the payment. The widows were to get a share out of the same allowance when there was no male member in the particular family. That amount cannot be a debt so long as it was payable to a male member and a maintenance when payable to a female member. Kishen Chander himself referred to this amount as maintenance in earlier proceedings.

We therefore hold that the view expressed by the Courts below with respect to the nature of this allowance is correct.

The validity of section 45 of the Act on the ground of the competence of the Legislature of the State was not questioned in the High Court. The contention, however, is that the Act was made by the State Legislature by virtue of Entry 21 in List II of the Seventh Schedule to the Government of India Act, 1935, which reads :

"Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents ; transfer, alienation and devolution of agricultural land ; land improvement and agricultural loans ; colonization ; Courts of Wards ; encumbered and attached estates ; treasure trove."

The question of succession to the impartible estate does not come under this Entry and comes under Entry No. 7 of List III of the Seventh Schedule to the Government of India Act which reads :

"Wills, intestacy, and succession, save as regards agricultural land."

The reply for the respondent is that the Act can come within either Item 9 or Item No. 21 or both, of List II of the Seventh Schedule to the Government of India Act, 1935.

We are of opinion that the Act does not deal with the succession to impartible estates. The Act acquires the impartible estate which vests in the Government on the notified date. The rights of the landholder in the estate cease on that date. The Act was enacted by the State Legislature by virtue of Item No. 9, List II, Seventh Schedule to the Government of India Act which reads :

"Compulsory acquisition of land."

The Act is not *ultra vires* the State Legislature.

The attack on the validity of section 45 of the Act on the ground of its contravening the provisions of Article 14 of the Constitution is not open to the appellants in view of Article 31-B which provides *inter alia* that none of the Acts specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void or ever to have become void on the ground that the Act takes away or abridges any of the rights conferred by any provisions of Part III. Article 14 is in that Part of the Constitution. The Act is mentioned at Item No. 10 in the Ninth Schedule. We therefore hold that the provisions of section 45 of the Act are not void.

The next question for determination is whether the appellants should have got share in the compensation as 'sharers' on account of the partible character of the estate reviving on the notified date as a result of the repeal of the Impartible Estates Act, 1904. We are concerned in these appeals with the distribution of advance compensation given and interim payments made in accordance with the provisions of the Act. We have held the relevant provisions to be valid. There-

fore, the appellants can only ask for their share of the compensation in accordance with those provisions. We do not consider it necessary to decide the question whether any property ceased to be impartible after the notified date and understand that an appeal in which the question directly arises is pending against a judgment in a civil suit holding that the buildings to which sub-section (4) of section 18 applied were impartible and were owned by the Rajah. Even if the appellants had any right in the estate, (though we do not so decide), that right ceased on the notified date in view of the provisions of section 3 of the Act and thereafter they are entitled to such rights and privileges only as are recognized or conferred by or under the Act.

Section 3 of the Act provides the consequences of notification of the estate. The relevant portions of section 3 are :

* * * * *

(b) the entire estate....shall stand transferred to the Government and vest in them

(c) all rights and interests created in or over the estate before the notified date by the principal or any other landholder, shall as against the Government cease and determine ;

* * * * *

(e) the principal or any other landholder and any other person, whose rights stand transferred under clause (b) or cease and determine under clause (c), shall be entitled only to such rights and privileges as are recognized or conferred on him by or under this Act.

* * * * *

(g) any rights and privileges which may have accrued in the estate, to any person before the notified date, against the principal or any other landholder thereof, shall cease and determine, and shall not be enforceable against the Government or such landholder, and every such person shall be entitled only to such rights and privileges as are recognized or conferred on him by or under this Act."

The estate was impartible up to the moment it vested in the Government on the notified date. Whatever be the nature of the compensation payable, the distribution of the compensation between the persons who had an interest in the estate would be in accordance with the provisions of sub-section (2) of section 45 which defines "sharers" to be the principal landholder and his legitimate sons, grandsons and the great-grandsons in the main line living or in the womb on the notified date, including sons, grandsons and great-grandsons adopted before such date. The appellants do not come under any of the persons mentioned in this clause and therefore they cannot get compensation as "sharers".

The result of our findings is that all the four appeals Nos. 116 to 119 of 1961, fail.

The dispute in the remaining six civil appeals relates to the principle on which the amounts of maintenance payable to the persons entitled to it are to be calculated. The contention is that when the net income of the estate in 1889 was about Rs. 6,00,000 a year, the allowance payable to each brother was Rs. 1,000 per month and that therefore the value of the interest of each brother in the estate came to about 1/50th of the income. The amount payable to him now, it is urged, should bear the same proportion to the basic annual sum which is first calculated under the provisions of the Act and later capitalised to obtain the amount of compensation payable for the estate. The relevant provisions in connection with the apportionment of the maintenance allowance applicable to impartible estates are to be found in section 45 of the Act. Sub-section (3) provides for determining the amount to which the creditors of the holder of the estate are entitled out of the assets of the estate. The amount due to them is first to be deducted from the compensation and out of the balance the maintenance-holders as a body can have an amount equal to 1/5th and no more. If the amount due to them comes to less than 1/5th they will get it as they had been getting in the past. If the amount exceeds 1/5th of the aforesaid balance, the Tribunal has the authority to re-open any arrangement previously made in respect of maintenance and reassess the amount to be paid to each maintenance-holder, keeping in regard the provisions of sub-section (5). There is nothing in this sub-section which authorises the Tribunal to calculate the incidence of the amount of compensation on the income of the estate at the time it was fixed. Even in the present case, the amount of maintenance allowance was not fixed as a certain proportion of the net income of the estate but was fixed, accord-

ing to document Exhibit A-1, after considering several factors affecting the question as is apparent from the following statement in the document :

"The aforesaid mediator considered in full the status of all the claimants, the status and dignity of the Estate and all the other matters deserving consideration and settled that the said Rajah, Rajagopala Krishna Yachendra.....of Venkatagiri should pay the allowances as mentioned below."

We are therefore of opinion that the Special Tribunal had held rightly that the apportionment of the advance payment of compensation and the interim payment had been made in accordance with the provisions of the Act.

In view of what we have stated above, we dismiss all the appeals with costs ; one hearing fee for Civil Appeals Nos. 116 to 119 of 1961 and one hearing fee for Civil Appeals Nos. 120 to 125 of 1961.

K.L.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, J. L. KAPUR, A. K. SARKAR, M. HIDAYATULLAH AND RAGHUBAR DAYAL, JJ.

M/s. William Jacks & Co., Ltd.

.. *Appellant**

v.

The State of Bihar

.. *Respondent.*

Constitution of India, 1950, Article 286 (2) (before its Amendment in 1956)—Inter-State transactions—No provision in the Bihar Sales Tax Act to tax—Sales Tax Continuance Order, 1950—No law immediately before the Constitution—No levy of tax can be made.

The assessee, company dealing in various kinds of machinery, had its place of business in Calcutta in the State of West Bengal. Between 26th January, 1950 and 30th September, 1951, it sold diverse machinery to various parties in the State of Bihar.

The price payable for the goods was F.O.R. Calcutta and it is not in dispute that the property in them passed to the purchaser as soon as the assessee put the goods on the railway at Calcutta. The actual delivery of the goods was given to the purchasers in Bihar for consumption there. The sales were in the course of inter-State trade and were of the kind contemplated in the *Explanation* in Article 286 (1) of the Constitution before its amendment by the Constitution (Sixth Amendment) Act, 1956.

In view of the judgment of this Court in *The Bengal Immunity Company case*, (1955) 2 S.C.R. 603: (1955) S.C.J. 672 : (1955) 2 M.L.J. (S.C.) 168 : (1955) A.N.W.R. (S.C.) 422, a dispute as to whether the sales by the appellant could be taxed by a Bihar law was no longer open.

The Sales Tax Continuance Order, 1950 was made in exercise of the powers conferred by the proviso to clause (2) of Article 286 of the Constitution.

A tax which can be legitimately levied under the Order of 1950 must be a tax which was being lawfully, levied by a State Government immediately before 26th January, 1950.

It was only a sale which came within the definition that the Act purported to tax. The sales in this case do not come within the definition and therefore were not taxed by the Bihar Sales Tax Act at all.

Section 33 of the Bihar Sales Tax Act was inserted in the Bihar Act by the Adaptation of Laws (Third Amendment) Order, 1951, and was brought into force from 26th January, 1950. Even though on the ban being lifted it might have been possible under this provision to tax the "Explanation sales", that is, the sales of the kind with which this case is concerned, that cannot assist the State in this case for since section 33 only came into force from 26th January, 1950, section 33 could not be a law levying a tax on any sales immediately before the commencement of the Constitution and the levy of tax under it, therefore, could not have been continued under the provisions of the Sales Tax Continuance Order, 1950.

Appeals from the Judgment and Order dated the 21st September, 1959 of the Patna High Court in Civil Misc. Judl. Case No. 593 of 1957.

Rajeshwari Prasad and S. P. Varma, Advocates, for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (D. P. Singh, R. K. Garg, S.C. Agarwal and M. K. Ramamurthi, Advocates of M/s. Ramamurthi & Co., with him), for Respondent.

The Judgment of the Court was delivered by

Sarkar, J.—The appellant is a company dealing in various kinds of machinery. It has its place of business in Calcutta, in the State of West Bengal. Between 26th January, 1950 and 30th September, 1951, it sold diverse machinery to various parties in the State of Bihar. In respect of these sales the appellant was assessed to sales tax under the Bihar Sales Tax Act, 1947. These appeals arise out of such assessments but, as will be seen later, the dispute now is much narrower than what it was in the beginning.

Before proceeding further we may briefly refer to the procedure of the sale. The price payable for the goods was F.O.R. Calcutta and it is not in dispute that the property in them passed to the purchaser as soon as the appellant put the goods on the railway at Calcutta. It has however been found and is no longer in dispute, that the actual delivery of the goods was given to the purchasers in Bihar for consumption there. The arguments in this Court have proceeded on the basis accepted by both sides, that the sales were in the course of inter-State trade and were of the kind contemplated in the *Explanation* in Article 286 (1) of the Constitution before its amendment by the Constitution (Sixth Amendment) Act, 1956. In this judgment we shall be concerned with Article 286 as it stood before the amendment.

The contention of the appellant before the Superintendent of Sales Tax, Patna, who was the assessing authority, was that the sales were inter-State sales and, therefore, the Bihar Act could not tax such sales in view of clause (2) of Article 286 though they were within the *Explanation* to clause (1) of that article. It was contended that so far as the Bihar Act purported to tax such sales, it was invalid. The Superintendent of Sales Tax rejected this contention relying on the case of *Bengal Immunity Company, Ltd. v. The State of Bihar*¹, which held that sales of the variety described in the *Explanation* to clause (1) (a) of Article 286 could be taxed by the law of the Legislature of the State where the goods were actually delivered for consumption in spite of the ban imposed by clause (2) of that article on State Legislatures taxing sales made in the course of inter-State trade. He, therefore, held that the Bihar Act could validly tax the appellant's sales even though they were inter-State sales. The appellant appealed from this decision to the Deputy Commissioner of Sales Tax, Bihar. By the time that authority heard the appeal the judgment of this Court in the *State of Bombay v. The United Motors*² had been delivered. This judgment confirmed the view taken in the Patna case¹ earlier mentioned. It said that clause (2) of Article 286 does not affect the power of the State in which delivery of goods is made for consumption there to tax inter-State sales or purchases and that the effect of the *Explanation* was that the transactions mentioned in it were outside the ban imposed by Article 286 (2). In view of this judgment, the Deputy Commissioner dismissed the appeal. A further revision application by the appellant to the Board of Revenue, Bihar, also failed. Before the decision by the Board of Revenue, however, this Court had decided in the appeal from the judgment in the Patna case¹, earlier mentioned, that the *United Motors case*² had been wrongly decided and that until Parliament by law made under Article 286 (2) provided otherwise, a State could not impose or authorise the imposition of any tax on sales or purchases of goods when such sales or purchases took place in the course of inter-State trade or commerce notwithstanding that the goods under such sales were actually delivered in that State for consumption there: see *Bengal Immunity Company Ltd. v. State of Bihar*³. Curiously however this case escaped the attention of the learned member of the Board of Revenue, Bihar, for if he had noticed it he would not have based himself on the *United Motors case*², as he had done. The appellant thereafter moved the Board of Revenue under section 25 of the Bihar Act for referring two questions to the High Court for decision and a reference was accordingly made. The present appeal is against the judgment of the High Court given on the reference.

1. I.L.R. 32 Pat. 19.

2. (1953) S.C.J. 373 : (1953) S.G.R. 1069 : (1953) 1 M.L.J. 743.

3. (1955, 2 S.C.R. 603 : (1955) 12 M.L.J. (S.C.) 168 : (1955) An.W.R. (S.C.) 422 : (1955) S.C.J. 672.

There are two appeals before us. They arise out of two assessment orders made in respect of two different periods. The High Court heard the two references together and dealt with them by one judgment. The questions framed in each case were in identical terms and perhaps, therefore, were not confined to the period with which each case was concerned.

As we have said earlier, two questions had been referred to the High Court but the appellant has not in this Court challenged the answer given by the High Court to the second question. We are, therefore, concerned in these appeals only with the first question which is in these terms :

"Whether the sales by the petitioner of (sic) goods which were actually delivered in Bihar as a direct result of such sales for the purpose of consumption in Bihar during the period 26th January, 1950 to 30th September, 1951, were sales which took place in the course of inter-State trade or commerce within the meaning of Article 286 (2) of the Constitution of India as it stood prior to the passing of the Constitution (Sixth Amendment) Act, 1956 and as such were not liable to the levy of Bihar Sales Tax, or whether in view of the subsequent passing by the Parliament of the Sales Tax Laws Validation Act, 1956 (VII of 1956) such sales became liable to the levy of Bihar Sales Tax for any part of the above period, say from 1st April, 1951, up to 30th September, 1951."

The High Court answered this question in these words :

"As regards the first question, it is clear that for the period from the 26th January, 1950, to the 31st March, 1951, the assessment is covered by the Sales Tax Continuance Order, 1950, promulgated by the President, and the assessment of the tax for this period is not liable to be attacked on the ground that there is a violation of the provisions of Article 286 (2) of the Constitution. For the second period, namely, from the 1st April, 1951, to the 30th September, 1951, the assessment is covered by the provisions of the Sales Tax Laws Validation Act, 1956, and the imposition of sales tax for this period also is legally valid."

The question in this appeal is whether the High Court was right in its view that the assessment between 26th January, 1950 to 31st March, 1951 is covered by the Sales Tax Continuance Order, 1950. There is no dispute now that the Sales Tax Validation Act, 1956 validated the collection of the tax on sales made during the period from 1st April, 1951 to 30th September, 1951.

In view of the judgment of this Court in the *Bengal Immunity Company case*¹, a dispute as to whether the sales by the appellant could be taxed by a Bihar law was no longer open. It was because of this that the dispute took a different turn and was based on the Sales Tax Continuance Order, 1950.

The contention of the appellant is this : This Sales Tax Continuance Order, 1950 was made in exercise of the powers conferred by the Proviso to clause (2) of Article 286 of the Constitution. That Proviso was in these terms :

"Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951."

Clause (2) of the Sales Tax Continuance Order, 1950 reads as follows :

"Any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution of India shall, until the thirty-first day of March, 1951, continue to be levied notwithstanding that the imposition of such tax is contrary to the provisions of clause (2) of the Article 286 of the said Constitution."

Clause (2) of Article 286 of the Constitution, it will be remembered, prohibited a State law from taxing a sale in the course of inter-State trade.

Now, a tax which can be legitimately levied under the Order of 1950 must be a tax which was being lawfully levied by a State Government immediately before 26th January, 1950. It is said by the appellant that before this date neither the Bihar Sales Tax Act nor any other Act purported to tax a sale of the kind with which we are concerned. If no Act did so, then no question of its lawfully levying a tax on such sales could at all arise. There was no tax as contemplated by the Order and none, therefore the levy of which the Order continued.

1. (1955) 2 S.C.R. 603; (1955) S.C.J. 672 : (S.C.) 422.
(1955) 2 M.L.J. (S.C.) 168 : (1955) An.W.R.

Learned counsel for the appellant drew our attention to the definition of sale in the Bihar Act as it stood at the relevant time. It was only a sale which came within the definition that the Act purported to tax. Learned counsel's contention is that the sales in this cause do not come within the definition and, therefore, were not taxed by the Bihar Act at all.

Now the definition of sale in the Act is in these terms:

"sale" means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge:

Provided that a transfer of goods on hire-purchase or other instalment system of payment shall notwithstanding the fact that the seller retains a title to any goods as security for payment of the price be deemed to be a sale:

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (III of 1930), the sale of any goods—

(i) which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, or

(ii) which are produced or manufactured in Bihar by the producer or manufacturer thereof, shall, wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar:

Provided further that the sale of goods in respect of a forward contract, whether goods under such contract are actually delivered or not, shall be deemed to have taken place on the date originally agreed upon for delivery.

It is obvious that the sales with which this case is concerned did not come within this definition at all nor even under the last proviso in it and these sales were not taxed by the Bihar Act.

Then there is section 33. That section provides as follows:

Section 33. (1) Notwithstanding anything contained in this Act,—

(a) a tax on the sale or purchase of goods shall not be imposed under this Act—

(i) where such sale or purchase takes place outside the State of Bihar ;

.....

(2) The Explanation to clause (i) of Article 286 of the Constitution shall apply for the interpretation of sub-clause (i) of clause (a) of sub-section (1).

Now, it has been held by this Court in *M.P.V. Sundararamier & Co. v. The State of Andhra Pradesh*¹, that an enactment of this kind did in fact impose a tax on the class of sales covered by the Explanation to Article 286 (i) (a) but that the imposition was conditional on the ban mentioned in Article 286 (2) being lifted by law of Parliament as provided therein. We do not think that the respondent State can derive any advantage from this provision. It was inserted in the Bihar Act by the Adaptation of Laws (Third Amendment) Order, 1951, and was brought into force from 26th January, 1950. Even though on the ban being lifted it might have been possible under this provision to tax the "explanation sales", that is, the sales of the kind with which this case is concerned, that cannot assist the respondent State in this case for since section 33 only came into force from 26th January, 1950, section 33 could not be a law levying a tax on any sales immediately before the commencement of the Constitution and the levy of tax under it, therefore, could not have been continued under the provisions of the Sales Tax Continuance Order, 1950.

It follows that the sales were not taxed by the Bihar Sales Tax Act, 1947 before the Constitution came into force. It is not contended that the Government of Bihar had been taxing these sales before 26th January, 1950, under any other provision. We therefore, think that the High Court was in error in holding that the levy of the tax on the sales by the appellant between 26th January, 1950 and 31st March, 1951, with which this case is concerned, was covered by the Sales Tax Continuance Order, 1950. We will set aside the judgment of the High Court in so far as it so holds and answer the question which we have earlier set out in so far as it is outstanding, in the negative. In our view, these sales were not liable to tax.

We think it right here to point out that the question as framed might suggest that the Court was asked to decide whether the sales were sales within the meaning of Article 286 (2) of the Constitution. But, as we have said earlier, that was not the point of the question. The Courts below have held that the sales were in the course of inter-State trade in which the goods were actually delivered in Bihar for consumption there and that view has not been disputed in this Court.

The appeal will, therefore, be allowed. We do not make any order as to costs as the appellant abandoned in this Court its contest to one of the two questions that had been referred and as it had not in the High Court contended that the Sales Tax Continuance Order, 1950 did not apply to the sales for the reason on which it based itself in this Court.

V.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—S. K. DAS, J.L. KAPUR, A.K. SARKAR, M. HIDAYATULLAH, AND RAGHUBAR DAYAL, JJ.

Firm A.T.B. Mehtab Majid & Co.

.. *Petitioner**

v.

The State of Madras and another

.. *Respondents.*

A. Abdul Shakoor

.. *Intervener.*

Constitution of India (1950), Article 304—Taxing laws—When can amount to restrictions on trade and commerce—Madras General Sales Tax Act (IX of 1939), sections 5 and Turnover and Assessment Rules (1939), Rule 16 substituted in 1955—Rule is a law—Rule 16 (2)—Discriminatory—Imported hides and skins which had been purchased or tanned outside State—Article 304 of the Constitution offended—Maintainability of petition under Article 32 of the Constitution.

Interpretation of Statute—Old rule substituted by new rule—New rule declared to be invalid—No revival of old rule.

Taxing laws can be restrictions on trade, commerce and intercourse, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures. Sales tax, of the kind under consideration here, cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating between goods of one State and goods of another, may effect the free flow of trade and it will then offend against Article 301 of the Constitution and will be valid only if it comes within the terms of Article 304 (a) of the Constitution.

Article 304 (a) enables the Legislature of a State to make laws affecting trade, commerce and intercourse. It enables the imposition of taxes on goods from other States if similar goods in the State are subjected to similar taxes, so as not to discriminate between the goods manufactured or produced in that State and the goods which are imported from other States. This means that if the effect of the sales tax on tanned hides or skins imported from outside is that the latter becomes subject to a higher tax by the application of the Proviso to sub-rule (2) of rule 16 of the Turnover and Assessment Rules, then the tax is discriminatory and unconstitutional and must be struck down.

Article 304 (a) allows the Legislature of a State to impose taxes on goods imported from other States and does not support the contention that the imposition must be at the point of entry only.

Section 5 (vi) of the Madras Act (IX of 1939) provides that the sale of hides or skins, whether tanned or untanned, shall be liable to tax under section 3 (1) only at such single point in the series of sales by successive dealers as may be prescribed. 'Prescribed' means 'prescribed by rules made under the Act'. Rule 16 prescribed such single point. This rule was made by the Governor in the exercise of power conferred on him under section 19 of the Act and would therefore have statutory force. In fact, sub-section (5) of section 19 provides that the Rules shall have effect as if enacted in the Act. Rule 16 is a law which would fall within "a law made by the State Legislature."

It is true that the impugned rule, by itself, does not impose the tax, but fixes the single point at which the tax imposed by sections 3 and 5 is to be levied. What the rule provides is a step necessary for the imposition of the tax in view of sections 3 and 5 and therefore the impugned rule is a part of the enactment which imposed the tax.

If the dealer has purchased the raw hides or skins in the State, he does not pay on the sale price of the tanned hides or skins; he pays on the purchase price only. If the dealer purchases raw hides or skins from outside the State and tans them within the State, he will be liable to pay sales tax on the sale price of the tanned hides or skins. He will have to pay more for tax even though the hides and skins are tanned within the State, merely on account of his having imported the hides and skins from outside, and having not therefore paid any tax under sub-rule (1).

The mere circumstance of tax having been paid on the sale of such hides or skins in their raw condition does not justify their forming goods of a different kind from the tanned hides or skins which had been imported from outside. At the time of sale of those hides or skins in the tanned state, there was no difference between them as goods and the hides or skins tanned outside the State as goods. The similarity contemplated by Article 304 (a) is in the nature of the quality and kind of the goods and not with respect to whether they were subject of a tax already or not.

The provisions of rule 16 (2) discriminate against the imported hides or skins which had been purchased or tanned outside the State and therefore they contravene the provisions of Article 304 (a) of the Constitution.

Once the old rule has been substituted by the new rule, it ceases to exist and it does not automatically get revived when the new rule is held to be invalid.

This is not a case in which the tax has been levied by the Deputy Commercial Tax Officer by misconstruing certain provisions of a valid Act, but is a case where the taxing officer had no jurisdiction to assess the tax on account of the invalidity of the rule under which the tax was assessed.

Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

S. T. Desai, Senior Advocate, (*S. Venkatakrishnan*, Advocate, with him), for Petitioner.

A. Ranganadham Chetty, Senior Advocate, (*A. V. Rangam*, Advocate, with him), for Respondents Nos. 1 and 2.

R. V. S. Mani, Advocate, for Intervener.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This petition under Article 32 of the Constitution raises the question of the validity of rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, hereinafter called the Rules. The impugned rule was published on 7th September, 1955, and was substituted in the place of old rule 16. The new rule was to be effective from 1st April, 1955.

The petitioner is a dealer in hides and skins. He sells hides and skins tanned outside the State of Madras, as well as those tanned inside the State. The Deputy Commercial Tax Officer, I, Moore Market Division, Madras, assessed the petitioner to sales tax for the year 1955-56 on a turnover of Rs. 29,89,624-15-11. Out of this a turnover of Rs. 28,10,625-2-0 represented sales of tanned hides and skins which had been obtained from outside the State of Madras.

Sales tax was levied on hides and skins under the provisions of the Madras General Sales Tax Act, 1938 (IX of 1939), hereinafter called the Act. Section 3 is the charging section and its relevant portions read:

"3. (1) Subject to the provisions of this Act,—

(a) every dealer shall pay for each year tax on his total turnover for such year; and

(b) the tax shall be calculated at the rate of three pias for every rupee in such turnover :—

* * * * *

Section 5 of the Act provides for exemptions and reductions of tax in certain cases. Clause (vi) thereof provides that the sale of hides and skins, whether tanned or untanned, shall be liable to tax under section 3, sub-section (1), only at such single point in the series of sales by successive dealers as may be prescribed.

Section 19 empowers the State Government to make rules to carry out the purposes of the Act.

The new rule 16, whose validity is challenged for the petitioner, reads :

"16 (1) In the case of untanned hides and/ or skins the tax under section 3 (1) shall be levied from the dealer who is the last purchaser in the State not exempt from taxation under section 3 (3) on the amount for which they are bought by him.

(2) (i) In the case of hides or skins which have been tanned outside the State the tax under section 3 (1) shall be levied from the dealer who in the State is the first dealer in such hides or skins not exempt from taxation under section 3 (3) on the amount for which they are sold by him.

(ii) In the case of tanned hides or skins which have been tanned within the State, the tax under section 3 (1) shall be levied from a person who is the first dealer in such hides or skins not exempt from taxation under section 3 (3) on the amount for which they are sold by him :

Provided that, if he proves that the tax has already been levied under sub-rule (1) on the untanned hides and skins out of which the tanned hides and skins had been produced, he shall not be so liable.

(3) The burden of proving that a transaction is not liable to taxation under this rule shall be on the dealer."

It is contended for the petitioner that the effect of this rule is that tanned hides or skins imported from outside the State and sold within the State are subject to a higher rate of tax than the tax imposed on hides or skins tanned and sold within the State, inasmuch as sales tax on the imported hides or skins tanned outside the State is on their sale price while the tax on hides or skins tanned within the State, though ostensibly on their sale price, is, in view of the Proviso to clause (ii) of sub-rule (2) of rule 16, really on the sale price of these hides or skins when they are purchased in the raw condition and which is substantially less than the sale price of tanned hides or skins. Further, for similar reasons, hides or skins imported from outside the State after purchase in their raw condition and then tanned inside the State are also subject to higher taxation than hides or skins purchased in the raw condition in the State and tanned within the State, as the tax on the former is on the sale price of the tanned hides or skins and on the latter is on the sale price of the raw hides or skins. Such a discriminatory taxation is said to offend the provisions of Article 304 (a) of the Constitution. Similar are the contentions for the Interveners in the case.

The contentions for the respondents are : (1) Sales tax does not come within the purview of Article 304 (a) as it is not a tax on the import of goods at the point of entry. (2) The impugned rule is not a law made by the State Legislature. (3) The impugned rule, by itself, does not impose the tax, but fixes the single point at which the tax imposed by sections 3 and 5 of the Act is to be levied. (4) The impugned rule was not made with an eye on the place of origin of the goods but as a matter of necessity, in view of the requirements of the statutory provisions to the effect that hides or skins, raw or tanned, came within one category and that the tax on them could be levied at a single point only. The impugned rule, therefore, fixed that single point with respect to the sale of raw hides or skins at the last purchase by the dealer in the State and with respect to the sale of tanned hides or skins at the first sale of such tanned hides or skins by the dealer in the State. In the former case, the tax was levied on the price the purchaser paid while in the latter case it was on the price at which the seller sold.

Article 301 of the Constitution which provides for trade, commerce and intercourse throughout the territory of India to be free subject to the other provisions of Part XIII, has been construed by this Court in *Atiabari Tea Co., Ltd. v. The State of Assam and others*¹ and in *Automobile Transport (Rajasthan), Ltd., etc. v. The State of Rajasthan and others*.²

The majority view in the *Atiabari Tea Co., Case*¹ which has been accepted in the *Automobile Transport Case*², is, as expressed by Gajendragadkar J., at page 860 :

"Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions ; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. . . . We are therefore satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be : Does the impugned restrictions operate directly or immediately on trade or its movement ? Our conclusion therefore is that when Article 301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Article 301 and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 of Part XIII."

In the majority judgment in the *Automobile Transport case*¹, it was said at page 1424:

"The interpretation which was accepted by the majority in the *Atiabari Tea Co. Case*² is correct, but subject to this clarification. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the the purview of the restrictions contemplated by Article 301."

Earlier in the judgment it was observed, at page 1422 :

"Such regulatory measures as do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Article 301. They are excluded from the purview of the provisions of Part XIII of the Constitution for the simple reason that they do not hamper trade, commerce and intercourse but rather facilitate them."

Subba Rao, J., concurred in this view and said at page 1436 :

"(1) Article 301 declares a right of free movement of trade without any obstructions by way of barriers, inter-State or intra-State, or other impediments operating as such barriers. (2) The said freedom is not impeded, but, on the other hand, promoted, by regulations creating conditions for the free movement of trade, such as, police regulations, provision for services, maintenance of roads, provision for aerodromes, wharfs, etc., with or without compensation."

It is therefore now well settled that taxing laws can be restrictions on trade commerce and intercourse, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures. Sales tax, of the kind under consideration here, cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating between goods of one State and goods of another, may affect the free flow of trade and it will then offend against Article 301 and will be valid only if it comes within the terms of Article 304 (a).

Article 304 (a) enables the Legislature of a State to make laws affecting trade, commerce and intercourse. It enables the imposition of taxes on goods from other States if similar goods in the State are subjected to similar taxes, so as not to discriminate between the goods manufactured or produced in that State and the goods which are imported from other States. This means that if the effect of the sales tax on tanned hides or skins imported from outside is that the latter becomes subject to a higher tax by the application of the Proviso to sub-rule (2) of rule 16 of the Rules, then the tax is discriminatory and unconstitutional and must be struck down.

We do not agree with the contentions for the respondents. The contention that Article 304 (a) is attracted only when the impost is at the border, i.e. when the goods enter the State on crossing the border of the State, is not sound. Article 304 (a) allows the Legislature of a State to impose taxes on goods imported from other States and does not support the contention that the imposition must be at the point of entry only.

Section 5 (vi) provides that the sale of hides or skins, whether tanned or untanned, shall be liable to tax under section 3 (1) only at such single point in the series of sales by successive dealers as may be prescribed. 'Prescribed' means 'prescribed by Rules made under the Act.' Rule 16 prescribes such single point. This rule was made by the Governor in the exercise of power conferred on him under section 19 of the Act and would therefore have statutory force. In fact, sub-section (5) of section 19 provides that the Rules shall have effect as if enacted in the Act. We therefore do not agree that rule 16 is not a law which would fall within a law made by the State Legislature.

It is true that the impugned rule, by itself, does not impose the tax, but fixes the single point at which the tax imposed by sections 3 and 5 is to be levied. What the rule provides is a step necessary for the imposition of the tax, in view of sections 3 and 5 and therefore the impugned rule is a part of the enactment which imposes the tax.

The fact that the impugned rule was made in order to prescribe the single point in the series of sales by successive dealers at which the tax on sale of hides

or skins was to be levied, in view of sections 3 and 5 of the Act, does not justify the making of such a rule which discriminates between the tax imposed on goods imported from outside the State and the goods produced or manufactured in the State.

Now, the only question that remains for consideration is whether this rule discriminates between hides or skins imported from outside the State and those manufactured or produced in the State.

Sub-rule (1) of the rule deals with the sale of raw hides and skins. The tax is levied from the dealer who is the last purchaser in the State. Its *vires* is not challenged. Clause (i) of sub-rule (2) provides for the levying of tax on the sale of hides and skins which had been tanned outside the State. The tax is levied from the dealer who, in the State, is the first seller of such hides or skins. The result is that a dealer in hides or skins which have been tanned outside the State has to pay the tax on the amount for which such hides or skins are sold by him. Clause (ii) of this sub-rule is in identical terms with respect to the sale of tanned hides or skins which have been tanned within the State. The tax is to be levied from the person who is the first dealer in such hides or skins and is levied on the amount for which they are sold. The discrimination, it is argued, comes in on account of the Proviso to this sub-clause (ii). The Proviso is to the effect that if the dealer of hides or skins which had been tanned within the State proves that tax had already been levied on those hides or skins in their raw condition, in accordance with sub-rule (1), he will not be liable to the tax under sub-clause (ii) of sub-rule (2). The result therefore is that the sale of hides or skins which had been purchased in the State and then tanned within the State is not subject to any further tax. Hides and skins tanned within the State are mostly those which had been purchased in their raw condition in the State and therefore on which tax had already been levied on the price paid by the purchaser at the time of their sale in the raw condition. If the quantum of tax had been the same, there might have been no case for grievance by the dealer of the tanned hides and skins which had been tanned outside the State. The grievance arises on account of the amount of tax levied being different on account of the existence of a substantial disparity in the price of the raw hides or skins and of those hides or skins after they had been tanned, though the rate is the same under section 3 (1) (b) of the Act. If the dealer has purchased the raw hide or skin in the State, he does not pay on the sale price of the tanned hides or skins; he pays on the purchase price only. If the dealer purchases raw hides or skins from outside the State and tans them within the State, he will be liable to pay sales tax on the sale price of the tanned hides or skins. He too will have to pay more for tax even though the hides and skins are tanned within the State, merely on account of his having imported the hides and skins from outside, and having not therefore paid any tax under sub-rule (1). It is true that dealers, though few, selling hides and skins which had been tanned within the State will also have to pay similar tax if no tax had been paid previously, they having not purchased the raw hides and skins at all as they were from the carcasses of animals owned by them; but this does not affect the discriminatory nature of the tax as already indicated.

It is urged for the respondent State that to consider discrimination between the imported goods and goods produced or manufactured in the State, circumstances and situations at the taxable point must be similar and that the circumstance of hides or skins tanned within the State and on which tax had been paid earlier at the time of their purchase in the raw condition is sufficient to consider such hides or skins to be different from the hides or skins which had been tanned outside the State. We do not consider that the mere circumstance of a tax having been paid on the sale of such hides or skins in their raw condition justifies their forming goods of a different kind from the tanned hides or skins which had been imported from outside. At the time of sale of those hides or skins in the tanned state, there was no difference between them as goods and the hides or skins tanned outside the State as goods. The similarity contemplated by Article 304 (a) is in the nature of the

quality and kind of the goods and not with respect to whether they were subject of a tax already or not.

We are therefore of opinion that the provisions of rule 16 (2) discriminate against the imported hides or skins which had been purchased or tanned outside the State and that therefore they contravene the provisions of Article 304 (a) of the Constitution.

It has been urged for the respondent that if the impugned rule be held to be invalid, old rule 16 gets revived and that the tax assessed on the petitioner will be good. We do not agree. Once the old rule has been substituted by the new rule, it ceases to exist and it does not automatically get revived when the new rule is held to be invalid.

Lastly, we may refer to the preliminary objection raised on behalf of the respondent to the maintainability of this petition, in view of the decision of this Court in *Ujjam Bai v. State of Uttar Pradesh*¹. This petition does not come within that decision. This is not a case in which the tax has been levied by the Deputy Commercial Tax Officer by misconstruing certain provisions of a valid Act, but is a case where the taxing officer had no jurisdiction to assess the tax on account of the invalidity of the rule under which the tax was assessed.

We therefore allow this petition with costs holding the impugned rule 16 (2) invalid and order the issue of a writ of *mandamus* to the State of Madras and the Sales Tax Authorities under the Act to refrain from enforcing any of the provisions of rule 16 (2) and direct them to refund the tax illegally collected from the petitioner.

V.S.

Petition allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S.J. IMAM, K. SUBBA RAO, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Birichh Bhuian and others

.. *Appellants**

v.

The State of Bihar

.. *Respondents.*

Criminal Procedure Code (V of 1898), section 537 (b)—Scope of.

Having regard to the scheme of the sections in Chapter XIX of the Criminal Procedure Code (V of 1898) and the historical background necessitating the amendment of section 537 of the Code, if the joinder of charges was contrary to the provisions of the Code, it would be a misjoinder of charges. Section 537 prohibits the revisional or the appellate Court from setting aside a finding, sentence or order passed by a Court of competent jurisdiction on the ground of such a misjoinder unless it has occasioned a failure of justice.

A charge is a precise formulation of a specific accusation made against a person of an offence alleged to have been committed by him. Sections 234 to 239 permit the joinder of such charges under specified conditions for the purpose of a single trial. Such a joinder may be of charges in respect of different offences committed by a single person or of several persons.

Appeal from the Judgment and order dated the 7th October, 1960 of the Patna High Court in Criminal Revision No. 979 of 1958.

K. K. Sinha, Advocate, for Appellants.

S. P. Varma and R. N. Sachthey, Advocates, for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by certificate raises the question of the scope of section 537 of the Criminal Procedure Code.

The facts are not in dispute and may be briefly stated. On 16th September, 1956, at about 3-55 P.M. the Sub-Inspector of Police, attached to Chainpur Outpost,

1. A.I.R. 1962 S.C. 1621.

*Criminal Appeal No. 224 of 1960.

20th November, 1962.

found 10 to 15 persons gambling by the side of the road. He arrested five out of them and the rest had escaped. The Sub-Inspector took the arrested persons to the Outpost and as one of the arrested persons Jamal adopted a violent attitude, he ordered him to be hand cuffed whereupon he began to abuse the Sub-Inspector. It happened that a large number of Bhians, male and female, were dancing close to the Outpost. Some of them hearing the noise rushed with lathis to the Outpost, assaulted the Sub-Inspector and two Constables and looted the Outpost. Three charge-sheets were filed in the Court of the Sub-Divisional Officer in respect of the said incidents, first against the appellants Nos. 1 to 4 and others under sections 147, 452 and 379 of the Indian Penal Code alleging that they raided the Outpost, looted some properties and assaulted the informant and others; the second against the appellants 5 and 4 others under section 224 of the Indian Penal Code and the third against appellant No. 5 and 4 others under section 11 of the Bengal Public Gambling Act. The said Sub-Divisional Officer took cognizance of the said cases and transferred them to the Court of the Magistrate, First Class, Daltonganj. On 29th December, 1956, on a petition filed by the Prosecuting Inspector the said Magistrate held a joint trial. On 22nd July, 1957, he delivered a single judgment convicting appellants Nos. 1 to 4 under section 147 of the Indian Penal Code and also under sections 452 and 380/34 of the Indian Penal Code and sentencing them to undergo rigorous imprisonment for one year for the former offence. No sentence was imposed for the latter offences. The appellant No. 5 along with 4 others was convicted under section 224 of the Indian Penal Code and sentenced to two years' rigorous imprisonment and was also convicted under section 11 of the Bengal Public Gambling Act, and sections 353 and 380/34 of the Indian Penal Code, but no separate sentence was awarded for the said offences. The appellant and others preferred an appeal against the said convictions and sentences to the Court of the Additional Judicial Commissioner of Ranchi and he by his judgment dated 10th July, 1958, convicted the appellants Nos. 1 to 4 under section 147 of the Indian Penal Code and acquitted them in respect of other charges. The conviction of the appellant No. 5 under section 224, Indian Penal Code, was maintained but the sentence was reduced to one year's rigorous imprisonment and a sentence of rigorous imprisonment for one month was imposed on appellants Nos. 4 and 5 and others under section 11 of the Bengal Public Gambling Act. The learned Judicial Commissioner held that the offence under section 11 of the Bengal Public Gambling Act was not committed in the course of the same transaction as the other offences were committed at the Police-Post and therefore there was a misjoinder of charges. Nonetheless he held that the said defect was curable as no prejudice had been caused to the appellants. The appellants preferred a Revision Petition to the High Court of Judicature at Patna and the said High Court dismissed the same on the ground that by reason of section 537 (b) of the Criminal Procedure Code the conviction could not be set aside as the said misjoinder of charges did not occasion a failure of justice. The present appeal was filed against the said order on a certificate issued by the High Court.

The learned Counsel for the appellants contended that section 537 (b) of the Criminal Procedure Code, could only save irregularities in the matter of framing of charges but could not cure a joint trial of charges against one person or several persons, that was not sanctioned by the Code. Elaborating his argument the learned counsel contended that the expression 'misjoinder of charges' in section 537 (b) of the Code must be confined only to misjoinder of accusations—according to him charge in the Code means only an accusation—and therefore a joint trial of offences and persons outside the scope of sections 233 to 239, of the Criminal Procedure Code, would not be misjoinder of charges within the meaning of said expression.

As the question raised turns upon the construction of the provisions of section 537 of the Criminal Procedure Code, it would be convenient to read the material part of it at this stage :—

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

(a) of any error, omission or irregularity in the complaint summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or

(b) of any error, omission or irregularity in the charge, including any misjoinder of charges, or

(c) * * * * *

(d) of any misdirection in any charge to a jury unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice.

Explanation :—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

Clause (b) was inserted by Act XXVI of 1955. The word 'charge' which occurred after 'warrant' in clause (a) was omitted and the new clause which specifically relates to charge was added. Further the expression 'mis-joinder of charges' was included in the general terms 'error, omission or irregularity in the charge.' The object of the section is manifest from its provisions. As the object of all rules of procedure is to ensure a fair trial so that justice may be done, the section in terms says that any violation of the provisions to the extent narrated therein not resulting in a failure of justice does not render a trial void. The scope of clause (b) could be best understood, if a brief historical background necessitating the amendment was noticed. The Judicial Committee in *Subrahmania Ayyar v. King Emperor*¹ held that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by section 537 of the Criminal Procedure Code. There the trial was held in contravention of the provisions of sections 233 and 234 of the Code of Criminal Procedure which provide that every separate offence shall be charged and tried separately except that three offences of the same kind may be tried together in one charge if committed within a period of one year. It was held that the misjoinder of charges was not an irregularity but an illegality and therefore the trial having been conducted in a manner prohibited by law was held to be altogether illegal. The Judicial Committee in *Abdul Rehman v. The King Emperor* considered that a violation of the provisions of section 360 of the Code which provides that the depositions should be read over to the witnesses before they sign, was only an irregularity curable under section 537 of the Code. Adverting to *Subrahmania Ayyar's case*¹ it pointed out that the procedure adopted in that case was one which the Code positively prohibited and it was possible that it might have worked actual injustice to the accused. The question again came before the Privy Council in *Babu Lal Chowkhani v. Emperor*³. One of the points there was whether the trial was held in infringement of section 239 (d) of the Criminal Procedure Code. The Board held that it was not. Then the question was posed that if there was a contravention of the said section, whether the case would be governed by *Subrahmania Ayyar's case*¹ or *Abdul Rehman's case*.² The Board did not think it was necessary to discuss the precise scope of what was decided in *Subrahmania Ayyar's case*¹ because in their understanding of section 239 (d) of the Code that question did not arise in that case. The point was again mooted by the Board in *Pulukuri Kotaya and others v. King Emperor*⁴. In that case there had been a breach of the Proviso to section 162 of the Code. It was held that in the circumstances of the case the said breach did not prejudice the accused and therefore the trial was saved by section 537 thereof. Sir John Beaumont speaking for the Board observed at page 12

1. (1902) I.L.R. 25 Mad. 61 : L.R. 28 I.A. 257 : 11 M.L.J. 233.

2. (1927) I.L.R. 5 Rangoon 53 : L.R. 54 I.A. 96 : 52 M.L.J. 585.

3. L.R. 65 I.A. 158 : (1938) 1 M.L.J. 647 : I.L.R. (1938) 2 Cal. 295.

4. L.R. 74 I.A. 65 : (1947) 1 M.L.J. 219 : I.L.R. (1948) Mad. 1.

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"When a trial is conducted in a manner different from that prescribed by the Code, as in *Subrahmania Ayyar v. King Emperor*¹ the trial is bad, and no question of curing an irregularity arises, but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537, and nonetheless so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind."

It will be seen from the said observations that the Judicial Committee left to the Courts to ascertain in each case whether an infringement of a provision of a Code is an illegality or an irregularity. There was a marked cleavage of opinion in India whether the later decisions of the Privy Council modified the rigor of the rule laid down in *Subrahmania Ayyar's case*¹ and a view was expressed in several decisions that a mere misjoinder of charges did not necessarily vitiate the trial unless there was a failure of justice, while other decisions took a contrary view. This Court in *Janardan Reddy and others v. The State of Hyderabad and others*², left open the question for future decision. In this state of law, the Parliament has intervened to set at rest the conflict by passing Act XXVI of 1955 making a separate provision in respect of errors, omissions or irregularities in a charge and also enlarging the meaning of the expression 'such errors etc.' so as to include a misjoinder of charges. After the amendment there is no scope for contending that misjoinder of charges is not saved by section 537 of the Criminal Procedure Code if it has not occasioned a failure of justice.

The next question is what is the meaning of the word 'charges' in the expression 'misjoinder of charges.' The word 'charge' the learned Counsel for the appellants contends means only an accusation of a crime or an information given by the Court of an allegation made against the accused. Does the section only save irregularities in the matter of mis-joinder of such accusations? Does it only save the irregularities committed in mixing up accusations in respect of offences or persons the joinder whereof has been permitted by the provisions of the Criminal Procedure Code? The misjoinder cured by the section, it is said, is illustrated by the decision in *Kadiri Kunhahammad v. The State of Madras*³. There in a case of conspiracy to commit a breach of trust a separate charge was framed in contravention of the Proviso to section 222 of the Criminal Procedure Code, i.e., in regard to an amount misappropriated during the period exceeding one year. This Court held that as acts of misappropriation committed during the course of the same transaction could be tried together in one trial, the contravention of section 222 was only an irregularity, for that act of misappropriation could have been split up into two parts, each of them covering a period less than one year and made subject of a separate charge. In that view it was held that section 537 saved the trial, as there was no failure of justice. There a joint trial was permitted by the relevant provisions of the Code, but the defect was only in having one charge instead of two charges. The question is whether the expression should be given only the limited meaning as contended above. The word 'charge' is defined in section 4 (c). It says that the charge includes any head of a charge where charge contained more heads than one. This definition does not throw any light, but it may be noted that that is only an inclusive one. Chapter XIX provides for the form of charges and for joinder of charges. Sections 221 to 232 give the particulars that a charge shall contain and the manner of rectifying defects if found therein. Section 221 says that in every charge the Court shall state the offence with which the accused is charged. Section 222 provides that the charge shall contain, such particulars as to the time and place of the alleged offence and the person against whom or the thing in respect of which it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged. Section 233 repeats that a charge shall also contain such particulars mentioned in sections 221 and 222. The form of a charge prescribed in Schedule 5 shows that it contains an

1. (1902) I.L.R. 25 Mad. 61 : L.R. 28 I.A.
 2. (1951) S.C.J. 320 : (1951) S.C.R. 344.
 3. A.I.R. 1960 S.C. 661.

accusation that a person committed a particular offence. It is, therefore, clear that a charge is not an accusation made or information given in abstract but an accusation made against a person in respect of an act committed or omitted in violation of a penal law forbidding or commanding it. In other words it is an accusation made against a person in respect of an offence alleged to have been committed by him. If so, sections 234 to 239 deal with joinder of such charges. Section 233 says that for every distinct offence of which any person is accused, there shall be a separate charge and every such charge shall be tried separately, except in cases mentioned in sections 234, 235, 236 and 239. Sections 234 to 236 permit joinder of charges and trial of different offences against a single accused in the circumstances mentioned in those sections and section 239 provides for the joinder of charges and the trial of several persons. The scheme of the said sections also indicates that a charge is not a mere abstraction but a concrete accusation against a person in respect of an offence and that their joinder is permitted under certain circumstances whether the joinder of charges is against one person or different persons. If the joinder of such charges is made in contravention of the said provisions, it will be misjoinder of charges. As we have noted already, before sub-section (b) was added to section 537 of the Criminal Procedure Code there was a conflict of views on the question whether such a misjoinder was only an irregularity which could be cured under that section, or an illegality which made it void. The amendment steered clear of that conflict and expressly included the misjoinder of charges in the errors and irregularities which could be cured thereunder. To summarise : a charge is a precise formulation of a specific accusation made against a person of an offence alleged to have been committed by him. Sections 234 to 239 permit the joinder of such charges under specified conditions for the purpose of a single trial. Such a joinder may be of charges in respect of different offences committed by a single person or several persons. If the joinder of charges was contrary to the provisions of the Code it would be a misjoinder of charges. Section 537 prohibits the revisional or the appellate Court from setting aside a finding, sentence or order passed by a Court of competent jurisdiction on the ground of such a misjoinder unless it has occasioned a failure of justice. In this case there was a clear misjoinder of charges against several persons. But the High Court held that there was no failure of justice and the appellants had their full say in the matter and they were not prejudiced in any way. We, therefore, hold that the High Court was right in not setting aside the convictions of the accused and the sentence passed against them.

In the result the appeal fails and is dismissed.

K.L.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B.P. SINHA, *Chief Justice*, P.B. GAJENDRAGADKAR, K.N. WANCHOO, K.C. DAS GUPTA AND J.C. SHAH, JJ.

Biswambhar Singh and another

.. *Appellants**

v.

The State of Orissa and others, etc.

.. *Respondents.*

Orissa Estates Abolition (Amendment) Act (XVII of 1954) amending the Orissa Estates Abolition Act (I of 1952), section 2 (h)—Intermediary Zamindaries of Hemgir and Sarapgarh—If sovereign states.

The Zamindars of Hemgir and Sarapgarh were not holders of sovereign states, and the inference is clear that they held or owned an "interest in land between the Raiyat and the State". A admitted on all hands, they are not Raiyats. Then whatever their interest may be whether as proprietors or tenure-holders or Inamdars or Jagirdars or Khorposhdars etc., etc., specifically mentioned in section 2 (h), they would come within the purview of the last clause and their interest would be that of an intermediary, because they stand in between the State at the apex and the cultivating Raiyat at the base and their interest in their lands was liable to be acquired under the Act.

1]

An 'act of State' may be the taking over of sovereign powers either by conquest or by treaty or by cession or otherwise. Hence even though there is no evidence of actual conquest of the territory of the appellants by the Raja of Gangpur, nor of active imposition of the sovereignty of that Raja over the territories in question, the fact remains that as a result of continuous process, the erstwhile ruler of these territories submitted to the sovereignty of the Raja with the result that the Ruler of Gangpur became, in effect, the sovereign power exercising his sovereign authority over those territories also. At the relevant date, (i.e.) at the end of 1947, and on the eve of the integration of the State of Gangpur with the State of Orissa, neither in fact nor in law, was there any vestige left of the sovereignty of the appellants and the territories in question were not sovereign states and had become part of the territory of the Ruler of Gangpur. All indications are that the appellants had become subjects of the Ruler of Gangpur before the latter's territory merged with the State of Orissa.

Appeals from the Judgment and Order dated the 25th April, 1957 of the Orissa High Court in O.J.C. Nos. 164 and 181 of 1954.

N.C. Chatterjee, Senior Advocate, (*M.S. Mohanty, A.N. Sinha and B.P. Maheshwari*, Advocates, with him), for Appellants.

C.B. Agarwala, Senior Advocate, (*R. Gopalakrishnan and R.H. Dhebar*, Advocates, with him), for Respondents Nos. 1 and 2 (in Civil Appeal No. 112 of 1960) and for Respondents (in Civil Appeal No. 113 of 1960).

The Judgment of the Court was delivered by

Sinha, C. J.—These two appeals on certificates of fitness granted by the High Court of Orissa raise the question of the constitutionality of the Orissa Estates Abolition (Amendment) Act (Orissa XVII of 1954) amending the main Act, the Orissa Estates Abolition Act (Orissa I of 1952), which hereinafter will be referred to as the Act. As the questions raised in the High Courts and in this Court are the same in both the appeals, they have been heard together and this judgment will govern them both.

It appears that the two Zamindars of Hemgir and Sarapgarh moved the High Court of Orissa under Article 226 of the Constitution for a writ of *mandamus* against the State of Orissa and the Collector of Sundargarh, which is a district formed after Merger. Previously it was part of the feudatory State of Gangpur. The two petitioners' Zamindaries covered about 540 square miles between them. The petitioners in the High Court in their petitions, claimed a sovereign status and referred to a mass of historical literature, including references to the Imperial Gazetteer by W.W. Hunter, Sir Richard Temple's Treaties, Zamindaries, Chieftainships in Central Provinces, and other official records. The High Court has found that the remote ancestors of the petitioners were Bhuiyan Chiefs, who were the original settlers and who had in course of time become the Chieftains of the place, exercising sovereign power. Subsequently, when the Rajput Rulers of Gangpur settled in that area, these Bhuiyan Chiefs accepted the suzerainty of those Rulers and gradually surrendered their sovereign rights. They used to pay annual '*Takolis*', which they originally paid as tributes to the suzerain, but which later became indistinguishable from land revenue. Their status *vis-a-vis* the Ruler of Gangpur remained undefined, though in successive revenue settlements made by the Ruler of Gangpur, with the concurrence of the then Political Department of the Government of India, they were described as Zamindars, and '*Khwats*' were issued to them. The High Court, on an examination of the relevant evidence, came to the conclusion that these Zamindars ultimately lost all vestiges of their sovereignty, and as a result of historical process became subject to the laws promulgated by the Ruler of Gangpur and that when the Ruler merged his State with the State of Orissa, with effect from 1st January, 1948, these petitioners were no better than mere subjects and had absolutely no claims to sovereign power. The High Court also found that considerable forest areas formed part of the land which belonged to them, and that those forest areas had no separate and distinct existence in the eye of law. The High Court repelled the petitioners' contention that their lands were not 'estates' as defined in Article 31-A (2) (a) of the Constitution. The High Court also rejected the contention that the Act, in so far as it applies to the petitioners, was discriminatory. The High Court thus held that Article 14 of the Constitution had not been contravened. It also held that the Act was not void under Article 254 (1) of the Constitution.

tution. It further held that the so called violation of Article 17 (2) of the "Universal Declaration of Human Rights" promulgated by the General Assembly of the United Nations on 10th December, 1948, to which India was a party, was not justiciable. In that view of the matter, these petitions were dismissed and both parties were directed to bear their own costs. The petitioner, in each case moved the High Court and obtained the necessary certificate for coming up in appeal to this Court. That is how these appeals are before us.

This is not the first time that these petitioners, now appellants in this Court, have figured as litigants in the High Court and in this Court in respect of their respective lands. When the Orissa Act I of 1952, the main Act, was enacted and came into force in February, 1952, the Government of Orissa notified the petitioners property also as coming within the purview of the Act. The appellants, along with another person claiming the same rights, belonging to Nagra, moved the High Court under Article 226 of the Constitution challenging the constitutionality of the Act. Those applications were heard by the High Court, and by majority it was held that the Act was valid and that the lands belonging to the petitioners could be taken over by the State, as a result of the operation of the Act. The petitioners in the High Court preferred an appeal to this Court. The Judgment of this Court is reported as *Biswambhar Singh v. State of Orissa*¹. This Court allowed the appeal of the proprietors of Hemgir and Sarpgarh on the ground that they were not 'intermediaries' as defined in section 2 (h) of the Act. As regards the proprietor of Nagra Zamindari, by a majority judgment, it was decided that he came within the definition of an 'intermediary', and that, therefore, his land would come within the definition of an 'estate' as defined in section 2 (g) of the Act. This Court distinguished the case of Nagra from that of the other two on the ground that the Zamindar of Nagra had acknowledged the overlordship of the Raja of Gangpur. As a result of the decision of this Court, allowing the appeals of the Zamindars of Hemgir and Sarapgarh and prohibiting the State of Orissa from taking over possession of those two zamindaries under the Act, the Orissa Legislature passed the Amending Act (XVII of 1954) recasting the definition of the two terms 'estate' and 'intermediary'. The amended definition of these two terms is as follows :—

"(g) 'estate' includes a part of an estate and means any land held by or vested in an Intermediary and included under one entry in any revenue roll or any of the general registers of revenue-paying lands and revenue free lands, prepared and maintained under the law relating to land revenue for the time being in force or under any rule, order, custom or usage having the force of law, and includes revenue-free lands not entered in any register or revenue-roll and all classes of tenures or under-tenures and any jagir, inam or muafi or other similar grant ;

Explanation I—Land revenue means all sums and payments in money or in kind, by whatever name designated or locally known, received or claimable by or on behalf of the State from an Intermediary on account of or in relation to any land held by or vested in such Intermediary ;

Explanation II—Revenue-free land includes land which is, or but for any special covenant, agreement, engagement or contract would have been liable to settlement and assessment of land revenue or with respect to which the State has power to make laws for settlement and assessment of land revenue ;

Explanation III.—In relation to merged territories, 'estate' as defined in this clause shall also include any mahal or village collection of more than one such mahal or village held by or vested in an Intermediary which has been or is liable to be assessed as one unit to land revenue whether such land revenue be payable or has been released or compounded for or redeemed in whole or in part.

"(h) 'Intermediary' with reference to any estate means a proprietor, sub-proprietor, landlord, landholder, malguzar, thikadar, gaontia, tenure-holder under-tenure-holder and includes an inamdar, a jagirdar, Zamindar, Ilaquedar, Khorposhdar, Parganadar, Sarbarakar and Muafidar including the Ruler of an Indian State merged with the State of Orissa and all other holders or owners of interest in land between the raiyat and the State ;

Explanation I.—Any two or more intermediaries holding a joint interest in an estate which is borne either on the revenue-roll or on the rent-roll of another Intermediary shall be deemed to be one Intermediary for the purposes of this Act ;

I]

Explanation II.—The heirs and successors-in-interest of an Intermediary where an Intermediary is a minor or of unsound mind or an idiot, his guardian, Committee or other legal curator shall be deemed to be an Intermediary for the purposes of this Act. All acts done by an Intermediary under this Act shall be deemed to have been done by his heirs and successors-in-interest and shall be binding on them."

In the statement of objects and reasons for amending the Act, it was indicated that these wide definitions of those two terms were enacted so that the decision of this Court with particular reference to these two properties may not stand in the way of acquiring them.

Though the arguments in the High Court occupied a very large field, on these appeals Mr. Chatterjee, on behalf of the appellants, has confined his submissions, in the ultimate analysis, to only one point, namely, that even after the amendment of the Act the Legislature has failed to achieve its objective of bringing the land of these two petitioners within the mischief of the Act. In other words, the contention is that the appellants were Sovereign Rulers whose States could not be taken over by the State of Orissa even after the amendment of the Act, as aforesaid.

The definition of 'intermediary' in section 2 (h) as amended, the argument proceeds further, would not take in the appellants' properties so as to entitle the State to acquire them, nor does the definition of 'estate' in the amended section 2 (g) cover the interest of the appellants in their respective lands. It is, therefore, necessary to find whether the interest of the appellants, in order to be liable to acquisition under the Act, could come within the purview of the definition of 'Intermediary'. It is difficult to accede to the argument that the all-inclusive definition of 'intermediary', as given in the amended clause (h) of section 2 would not cover the interest of the appellants. If it is held, as we must hold in agreement with the High Court, as will presently appear, that the appellants were not holders of sovereign States, then the inference is clear that they held or owned an 'interest in land between the Raiyat and the State'. As admitted on all hands, they are not Raiyats. Then, whatever their interest may be, whether as proprietors or tenure-holders or *Inamdars* or *Jagirdars* or *Khorposhdars*, etc., etc., specifically mentioned in the definition, they would come within the purview of the last clause and their interest would be that of an intermediary, because, they stand in between the State at the apex and the cultivating Raiyat at the base. If the interest of these appellants is not that of a Sovereign State, they hold their property as intermediaries and the payment which they used to make to the Raja of Gangpur, and later to the State of Orissa, would be in the nature of land revenue.

The main argument, therefore, of Mr. Chatterjee was directed to showing that the appellants held the land as sovereign powers, and that the *Takoli* which they paid to the Raja of Gangpur was only in the nature of tribute and not land revenue. In our opinion, there is no substance in this contention. It is true that there is no evidence of an "act of State" in the nature of a conquest by the Raja of Gangpur or that the Raja imposed his sovereignty on these principalities by force of arms or by express agreement. It was, therefore, argued that there was no scope for applying the doctrine of "act of State" to these principalities. There is a fallacy in this argument. It was pointed out by this Court in *Promod Chandra Deb v. State of Orissa*¹ that an "act of State" may be the taking over of sovereign powers either by conquest or by treaty or by cession or otherwise. It may have happened on a particular date by a public declaration or proclamation, or it may have been the result of a historical process spread over many years, and sovereign powers including the right to legislate in that territory and to administer it may be acquired without the territory itself merging in the new State. It has been found by the High Court that the various laws which were in force in Gangpur State were in force in Hemgir and Sarapgarh also, by their own force and not as a result of any agreement between Sovereign States. Furthermore the various departments of administration were also in the hands of the staff maintained and supervised by the Ruler of Gangpur.

Hence, at the date of the merger of the Gangpur State in the State of Orissa, not even a vestige of sovereignty was left with these appellants. It is, therefore, not necessary to refer to a large mass of historical evidence which shows that at one time in the ancient past these appellants or their ancestors were sovereign chiefs. They may have occupied that position in the remote past, but as a result of historical process spread over many years, those rights became vested in the Ruler of Gangpur not necessarily by express agreement but impliedly, by conduct, over a series of years. We are concerned with the year 1947, and in that year there is no evidence on behalf of the appellants that they had any sovereign authority left in them. Their position is analogous to that of the *Bhomischaras* of Rajasthan, dealt with by this Court in *Thakur Amar Singhji v. State of Rajasthan*¹, and that of the *Cis-Sutlej Jagir* in Punjab, dealt with by this Court in *Amarsarjit Singh v. State of Punjab*². Hence, even though there is no evidence of actual conquest of the territory of the appellants by the Raja of Gangpur, nor of active imposition of the sovereignty of that Raja over the territories in question, the fact remains that as a result of a continuous process, the erstwhile rulers of these territories submitted to the sovereignty of the Raja with the result that the Ruler of Gangpur became, in effect, the sovereign power exercising his sovereign authority over those territories also, and the outward symbols of sovereignty were that the laws of Gangpur State were in force in Hemgir and Sarghar areas also not by virtue of any orders of the appellants but by their own force, as has been pointed out by the High Court on a consideration of all the relevant evidence, which need not be recapitulated here. The Administrative control also had passed into the hands of the Ruler of Gangpur. Hence, neither in fact nor in law was there any vestige left of the sovereignty of the appellants by 1947 though it may not be possible to determine by what exact process and by what exact date, this transition was complete. Apparently it was spread over many years. We know only this much that at the relevant date *i.e.*, at the end of 1947, and on the eve of the integration of the State of Gangpur with the State of Orissa, the territories in question were not sovereign states and had become part of the territory of the Ruler of Gangpur. The law does not know any *tertium quid* between a Sovereign State and a State which is partly sovereign and partly not so. The erstwhile rulers of these territories were neither sovereigns in their own rights or had become subjects of the Ruler of Gangpur, and all indications are that the appellants had become subjects of the Ruler of Gangpur before the latter's territory merged with the State of Orissa.

On the finding that the petitioners, or their ancestors, had ceased to be sovereign States, on the eve of the merger of the State of Gangpur with the State of Orissa, the petitioners' position would be that of intermediaries who held or owned "interest in land between the Raiyat and the State", within the meaning of section 2 (f) of the Act, and the '*Takoli*' paid by them to the Ruler of Gangpur and later to the State of Orissa was land revenue within *Explanation I* read with *Explanation III* to section 2 (g) which defines "estate". There is, thus, no escape from the conclusion that their interest in their lands was liable to be acquired under the Act.

No other point was urged before us in support of the appeals, and as the only point urged in this Court has no substance in it, the appeals must be held to be without any merit. They are accordingly dismissed with costs, one set of hearing fees.

K.L.B.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—B. P. SINHA, *Chief Justice*, P.B. GAJENDRAGADKAR, K.N. WANCHOO, K.C. DAS GUPTA AND J. C. SHAH, JJ.

V. S. Menon

.. Appellant*

v.

The Union of India and another

.. Respondents.

Civil Services (Safeguarding of National Security) Rules, 1949, Rule 3—Charge under—Requisites—Compulsory retirement of a Government servant—Nature of order of compulsory retirement under the Rules—Applicability of Article 226 of the Constitution of India (1950) to such order.

Rule 3 of the Civil Services (Safeguarding of National Security) Rules, 1949, contemplates compulsory retirement from service of a Government servant who (a) is engaged in subversive activities or (b) is reasonably suspected to be engaged in subversive activities or (c) is associated with others in subversive activities. The charge against the appellant that 'you have continued to associate with others engaged in subversive activities' is not a charge which could be sustained under rule 3. As the rule is of a penal character, it has to be very strictly construed.

There is no provision in the Rules relating to Posts and Telegraphs Service corresponding to rule 149 of the Railway Establishment Code. In the instant case, therefore, the premature termination of the service before the age of superannuation could be justified only by virtue of rule 3. As rule 3 had not been attracted to the appellant's case, it follows that the premature termination of the appellant's service would be tantamount to removal from service by way of penalty, a grievance which the appellant could ventilate under Article 226 of the Constitution of India (1950). On the findings, the appellant is entitled to a declaration that his service was not legally terminated in accordance with rule 3 of the Security Rules.

Appeal by Special Leave from the Judgment and Order, dated the 6th October, 1960, of the Punjab High Court (Circuit Bench) at Delhi in L.P.A. No. 23-D of 1957.

R. V. S. Mani, H. G. Mital and P. Kesava Pillai, Advocates, for Appellant.

G. K. Daphtary, Solicitor General of India (R. H. Dhebar, Advocate for P. D. Menon, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Sinha, G. J.—This appeal by Special Leave is directed against the judgment and order of the Punjab High Court, dated 6th October, 1960, dismissing Letters Patent Appeal from the judgment of a single Judge of that Court, dated 10th September, 1957, dismissing the appellant's writ petition under Article 226 of the Constitution. There are two respondents, namely, (1) the Union of India and (2) Director-General, Posts and Telegraphs, New Delhi.

This case has had a chequered history as will appear from the following facts. The appellant was appointed in June, 1943 as an Engineering Supervisor by the second respondent. In January, 1949, he was suspended from service on account of certain activities of his which were considered to be objectionable. He was duly served with a notice to show cause, and his case was in due course considered by the Committee of Advisers, who recommended that he be retained in service. In pursuance of the recommendation of the Advisory Committee, the appellant was reinstated with effect from 26th May, 1951. After passing his departmental examination in 1952, the appellant was appointed as Officiating Sub-Divisional Officer, Telegraphs. While he was so employed at Nagpur, he was served with a notice, dated 3rd November, 1952, from the office of the Director-General, Posts and Telegraphs, under the provisions of rules 3 and 4 of Civil Services (Safeguarding of National Security) Rules, 1949 which hereinafter will be referred to as the Rules in the following terms :

"No. Sta 98-10/52.

New Delhi, the 3rd November, 1952.

Whereas in the opinion of the "Competent Authority" as defined in rule 2 of the Civil Services (Safeguarding of National Security) Rules, 1949, (who in your case is the Director-General) there are

reasonable grounds for believing that after your reinstatement in service on the 26th May, 1951 you have continued to associate with others engaged in subversive activities in such a manner as to raise doubts about your reliability and consequently it is proposed to take action for your compulsory retirement from service under rule 3 of the said Rules. The following are the allegations against you :—

"Soon after your arrival in Nagpur important local Communists were reported to have contacted you and during the discussions you were reported to have interested yourself in the political activities of the Communist Party and other political organisations and groups in Nagpur. You are also reported to be actively continuing your association with Shri B. N. Mukherjee and other prominent local Communists."

2. You are hereby required to proceed on such leave as may be admissible to you with effect from the 15th November, 1952.

3. You are hereby required to state within 14 days of the receipt of this notice whether you accept or deny the accuracy of the above allegations. If you do not reply within that period, it will be assumed that you admit the allegations.

4. In either case, you may within the same period submit any representation you wish to make as to why you should not be compulsorily retired from service under the said Rules (copy attached).

5. If after considering your representation the competent authority decides that no further action should be taken against you, you will be informed accordingly.

6. If after considering your representation the competent authority considers that there are sufficient grounds for taking further action, the materials on record together with your representation will be referred to the Committee of Advisers set up by the Government of India for this purpose.

7. You are further asked to state whether you wish to be heard in person by the Director-General or by the Committee of Advisers before orders are passed on your case.

8. If you send no reply within 14 days of the receipt of this notice, orders will be passed on your case without any further reference to you.

Sd.....
Director-General
Posts and Telegraphs,
New Delhi."

On 17th November, 1952 the appellant submitted his answer to the show-cause notice. The answer runs into 9 pages (typescript) to the effect that the charge was vague, baseless and without foundation, and requesting for a personal hearing before the second respondent, as well as before the Committee of Advisers. The appellant submitted a letter on 23rd January, 1953, requesting that "at the time of the oral hearing all the evidence on which the charges mentioned in your letter No. STA 98-10/52, dated 3rd November, 1952, have been framed," may be made available to him so that on scrutinising them he might prove his innocence. On 28th January, 1953, the second respondent examined the appellant in person, and thereafter on 19th May, 1953, he was served a second show-cause notice, which is in these terms :

"Memo. No. STA-98-10/52/SEA.

Dated New Delhi, the 19th May, 1953.

Shri V. S. Menon, Sub-Divisional Officer, Telegraphs, Nagpur, was called upon to answer the following charges :—

"Soon after your arrival in Nagpur important local Communists were reported to have contacted you and during the discussions you were reported to have interested yourself in the political activities of the Communist Party and other political organisations and groups, in Nagpur. You are also reported to be actively continuing your association with Shri B. N. Mukherjee and other prominent local Communists."

2. The Committee of Advisers have considered the defence submitted by Shri V. S. Menon and the record of the personal hearing and are provisionally of the opinion that sufficient grounds exist to bring home these charges to Shri Menon, justifying his compulsory retirement from service under rule 3 of the Civil Services (Safeguarding of National Security) Rules, 1949.

3. Shri Menon is, therefore, called upon to show cause within 15 days of the receipt of this Memorandum, why he should not be compulsorily retired from service.

4. A copy of the record of personal hearing granted to him is forwarded herewith.

5. If Shri Menon fails to submit his defence within the period stipulated above, orders will be passed *ex parte*.

Sd.....
Director-General."

On 28th August, 1953, the following order was passed against him :

"Memorandum No. STA. 98-10/52/SEA

Dated New Delhi, the 28th August, 1953.

In the office Memo. of the Director-General, Posts and Telegraphs No. STA. 98-10/52, dated the 3rd November, 1952, Shri V. S. Menon, Officiating Sub-Divisional Officer, Telegraphs, Nagpur, was informed of the grounds on which it is proposed to take action for his compulsory retirement from service under rule 3 of the Civil Services (Safeguarding of National Security) Rules, 1949, and was called upon to submit any representation he wished to make as to why he should not be compulsorily retired from service under the said Rules. Shri Menon submitted his statement in defence on 17th November, 1952, in which he also expressed a desire for a personal hearing by the Director-General. He was accordingly granted an oral hearing by the Director-General on 28th January, 1953.

2. The Committee of Advisers having considered the defence submitted by Shri V. S. Menon, and the record of the personal hearing, were of the opinion that sufficient grounds exist justifying Shri Menon's compulsory retirement from service under rule 3 of the said Rules. Shri Menon was thereupon called upon in Director-General, Posts and Telegraphs Memo. No. STA. 98-10/52/SEA, dated the 19th May, 1953 to show cause why he should not be compulsorily retired from service. Shri Menon submitted his representation on 18th June, 1953. This representation has also been considered.

3. The competent authority (who in this case is the Director-General, Posts and Telegraphs) after careful consideration of this case is of the opinion that Shri V. S. Menon has been associated with others in subversive activities in such a manner as to raise doubts about his reliability, and is satisfied that his retention in the public service is prejudicial to national security. Shri V. S. Menon is hereby informed that the competent authority has accordingly decided, with the prior approval of the President, that Shri V. S. Menon should be compulsorily retired from service in accordance with the provisions of the rule 3 of Civil Services (Safeguarding of National Security) Rules, 1949.

(H. L. Jerath)
Director-General,
Posts and Telegraphs."

The appellant moved the erstwhile High Court of Judicature at Nagpur under Article 226 of the Constitution. The case was heard by a Full Bench of three Judges consisting of Kaushalendra Rao, V. R. Sen and Bhutt, JJ. The Court was agreed as to the order to be passed, namely, that the petition should be dismissed on the ground that no writ could issue against the respondents, though the Judges were not agreed on the merits of the controversy. Kaushalendra Rao, J., was of the view that even on merits the Court could not grant any relief, whereas Sen and Bhutt, JJ., took the view that it was not covered by Article 310 of the Constitution, and that the allegations in the initial show-cause notice were vague, nor did they disclose any personal association on the part of the appellant in any subversive activities, and that, therefore, there was no compliance with rule 4 of the Rules.

As the petition under Article 226 of the Constitution in the Nagpur High Court proved infructuous, the appellant moved the Circuit Bench of the Punjab High Court at Delhi under the same Article. The petition was heard by a learned Single Judge (Falshaw, J.), who by his judgment and order dated 10th September, 1957, disagreeing with the views of the majority of the Judges of the Nagpur High Court, dismissed the petition holding that the charge laid against the appellant should not be too strictly construed, and that his compulsory retirement under the Rules did not amount to dismissal or removal from service under Article 311 of the Constitution. From the judgment of the learned Single Judge, the appellant preferred a Letters Patent Appeal, which was heard by a Division Bench consisting of Khosla, C.J., and Shamsheer Bahadur, J. The Bench dismissed the appeal, though in their view also the charge-sheet submitted against the petitioner was "not entirely in accordance with the terms of rule 3". In their view, the enquiry was proper, and reasonable opportunity had been afforded to the petitioner to show cause against the proposed action. The appellant moved this Court for Special Leave which was granted on 21st February, 1961, and that is how the matter is before us.

Learned Counsel for the appellant has raised a number of contentions, namely, that (1) the Rules are a colourable exercise of the power conferred on the Governor-General to make Rules under section 241 (2) of the Government of India Act, 1935, because the purpose of the Rules is not regulation of conditions of service ; (2) the Rules violate section 241 (3) (c) ; (3) the Rules do not provide for or authorise

the constitution of a Committee of Advisers ; (4) the charge against the petitioner is outside the provisions of rule 3, which requires the participation of the officer proceeded against in subversive activities and not his association with persons who are concerned with such activities; (5) the appellant was not given reasonable opportunity of showing cause because, in the first instance, the charge and the allegations were vague without any particulars, and secondly because the 'competent authority' withheld all evidence on the ground that it was contained in secret documents ; (6) the appellant was not given any opportunity of hearing by the Committee of Advisers, for which he had made a special request ; and (7) compulsory retirement means premature termination of service, and is, therefore, a special penalty which could not be inflicted without appropriate enquiry and proper opportunity to show cause.

It is not necessary to consider all the grounds of attack raised on behalf of the appellant because, in our opinion, the appeal must succeed on the ground that the charge against the appellant, as quoted above, is that "you have continued to associate with others engaged in subversive activities", which is not the gravamen of the charge as contemplated by rule 3, which is in these terms :

"3. A Government servant who, in the opinion of the Competent Authority is engaged in or is reasonably suspected to be engaged in subversive activities or is associated with others in subversive activities in such a manner as to raise doubts about his reliability may be compulsorily retired from service ;

Provided that a Government servant shall not be so retired, unless the Competent Authority is satisfied that his retention in the public service is prejudicial to national security and unless, where the Competent Authority is a head of a department, the prior approval of the Governor-General has been obtained."

That rule contemplates compulsory retirement from service of a Government servant who (a) is engaged in subversive activities or (b) is reasonably suspected to be engaged in subversive activities, or (c) is associated with others in subversive activities. If any one of those three alternative conditions is fulfilled, then the Competent Authority has also to be satisfied that the manner of his activities is such as to raise doubts about his reliability, as also that his retention in the public service is prejudicial to national security. And, finally, where such an order is passed by a competent authority in his capacity as the head of department, the prior approval of the Governor-General (now the President) has to be obtained. It is manifest on the charge, as framed against the appellant that he was not even alleged to have been engaged or to be reasonably suspected to have been engaged in subversive activities or to be engaged in such activities in association with others. It was only alleged against him that he associated with others who were engaged in subversive activities. That is not a charge which could be sustained under rule 3. As the rule is of a penal character, it has to be very strictly construed. If the appellant was even suspected to have been engaged in subversive activities, the charge could have been in those terms. But it is not even alleged that he was suspected to be engaged in subversive activities far less to have been engaged in such activities either by himself or in association with others. As the charge against the appellant did not strictly come within the purview of rule 3, there was no basis for the procedure adopted in pursuance of rule 4. It is not, therefore, necessary to pursue the enquiry as to whether the procedure actually adopted complied with that laid down in rule 4.

Apart from the initial serious defect in the charge laid against the appellant, even in the allegations made against him it was only said that after his arrival in Nagpur important local Communists were reported to have contacted him, and that he was interested in political activities of the Communist Party and other political organisations and groups in Nagpur, and finally, that he was reported to be continuing his association with Shri B. N. Mukherjee and other prominent local Communists. But nowhere it is alleged that the appellant had taken any part in subversive activities by himself or along with others with whom he is said to have been associated. Taking interest in political activities of the Communist Party would not amount to taking part in subversive activities so long as the Communist Party continued to be a recognised political organisation, which has not been

1] banned. It cannot be asserted that simply talking with members of the Communist Party or associating with such members would amount to engaging in subversive activities. Subversive activity, in order to bring the person within the purview of the rule, must amount to actively pursuing such activities as are calculated to subvert the Government established by law. No such allegations appear to have been made against the appellant.

The question remains whether in the facts and circumstances disclosed in this case, the appellant has any just grievance which could be remedied by the High Court under Article 226. The judgment under appeal has taken the view that this case is governed by the decision of this Court in *P. Balakotaiah v. The Union of India*¹. That was a case in which the services of the appellants who were railway servants had been terminated for reasons of national security under rule 3 of the Railway Service (Safeguarding of National Security) Rules, 1949. Rule 3 in that case was practically in the same terms as rule 3 in this case. Rule 3 in that case was held to be constitutionally valid as not being repugnant to Article 14 of the Constitution. But, in our opinion, the High Court was in error in holding that the decision of this Court in *Balakotaiah's case*¹ governed the present case also. This Court held further that the charge drawn up against the railway servants concerned showed not only that they were Communists or Trade Unionists but that they were engaged in subversive activities. Hence, it could not be said that the orders terminating their services contravened Article 19 (1) (c) of the Constitution. It was also held by this Court that Article 311 of the Constitution was not attracted to the case because that was not a case of dismissal or removal from service by way of punishment. It was also held in that case that the order terminating the services under rule 3 of the Security Rules stood on the same footing as an order of discharge under rule 148 of the Railway Establishment Code, and was, therefore, outside the purview of Article 311 of the Constitution. It is not disputed that there is no provision in the Rules relating to Posts and Telegraphs Service corresponding to rule 148 of the Railway Establishment Code. In the instant case, therefore, the premature termination of service before the age of superannuation could be justified only by virtue of rule 3. As rule 3 had not been attracted to the appellant's case for reasons given above, it follows that the premature termination of the appellant's service would be tantamount to removal from service by way of penalty. In that view of the matter, the appellant certainly had a grievance which he could ventilate under Article 226 of the Constitution, and on the findings arrived at by us on the main question he is entitled to the declaration that his service was not legally terminated in accordance with rule 3 of the Security Rules. The appeal is accordingly allowed with costs.

Appeal allowed.

K.L.B.

THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction).

PRESENT :—S. K. DAS, J. L. KAPUR, A. K. SARKAR, M. HIDAYATULLAH AND RAGHUBAR DAYAL, JJ.
A. V. Thomas & Co., Ltd.

.. Appellant*

The Deputy Commissioner of Agricultural Income-tax and Sales Tax, Trivandrum

.. Respondent.

M/s. Outcherloney Valley Estates (1938), Ltd., Coimbatore .. Interveners.
Travancore-Cochin General Sales Tax Act (XI of 1125)—Sale of tea stored in godowns in Willingdon Island (then in Travancore-Cochin State) by public auction on the basis of samples in Fort Cochin (then in Madras State)—Payment of price and obtaining of delivery orders at Fort Cochin—Actual delivery at Willingdon Island and export for distribution outside Travancore-Cochin State—Sales if liable to Travancore-Cochin Sales Tax—Explanation to Article 286 (1) (a) of the Constitution of India (1950)—If applicable.
Tea stored in godowns in Willingdon Island (in the State of Travancore-Cochin at the crucial time) was sold by public auction on the basis of samples in Fort Cochin (then in Madras State) and

1. (1958) S.C.R. 1052 : (1958) S.C.J. 451 : (S.C.) 162.
(1958) 1 M.L.J. (S.C.) 162 : (1958) 1 An. W.R.
*C.A. No. 628 of 1961.

30th November, 1962.

money was paid and delivery orders obtained at Fort Cochin though the actual delivery was taken at Willingdon Island from where the teas were sent out for consumption either in other parts of India or were exported out of India.

Held: The only State which would have power to levy a tax on such sales would be the State or Madras and so far as the State of Travancore-Cochin was concerned, the sale would be an outside sale because the title passed in Fort Cochin where money was paid and delivery orders were obtained by the successful bidders though the actual delivery of goods was made at Willingdon Island in Travancore-Cochin State.

The fiction created by the *Explanation* to Article 286 (1) (a) of the Constitution of India is inapplicable because there was no delivery as a direct result of sale for the purpose of consumption in any particular State.

Appeal from the Judgment and Order, dated the 24th February, 1960, of the Kerala High Court in Tax Revision Case No. 22 of 1957.

G.B. Pai, Advocate and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Appellant.

V. P. Gopalan Nambiar, Advocate-General for the State of Kerala (*Sardar Bahadur*, Advocate, with him), for Respondent.

A. V. Viswanatha Sastri, Senior Advocate (*S. N. Andley*, *Rameshwar Nath* and *P. L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, with him), for Interveners,

The Judgment of the Court was delivered by

Kapur, J.—This appeal by certificate of the High Court of Kerala raises the question of the taxability of sales of tea under the Travancore-Cochin General Sales Tax Act, hereinafter termed the Act, and the Rules made thereunder. The assessment period is 1952-53 and the turnover was of a sum of Rs. 3,77,644 on which a tax of Rs. 5,900-11-0 was levied. The appellant before us is the assessee company and the respondent is Deputy Commissioner of Agricultural Income-tax and Sales Tax.

Mr. A. V. Viswanatha Sastri on behalf of Outcherloney Valley Estates (1938), Ltd., has applied for intervention on the ground that in case of that company also the State of Kerala has, on similar facts, levied sales tax on certain transactions, that the High Court of Kerala has upheld the taxability of the transactions relying on the judgment which is under appeal in the present case, and that the intervener has obtained Special Leave to appeal against that judgment and the records are under print. In view of these circumstances we have allowed that company to intervene in the present appeal.

The assessment was made on 30th March, 1955 under section 33 (i) of the Act on the ground that the sales of tea had escaped assessment. The appeal against that order was unsuccessful and thereafter a further appeal was taken to the Sales Tax Appellate Tribunal which by its order dated 12th August, 1957, held that the ban under Article 286 (1) (a) of the Constitution on sales which are outside the State applied in regard to the sales of 'full lots' and therefore remanded the case to the Sales Tax Officer. Against that order a revision was taken to the High Court which held that the decision of the Appellate Tribunal in regard to the applicability of Article 286 (1) (a) was erroneous and therefore the sales were subject to sales tax under the Act. It is against that judgment and order that the assessee company has come to this Court on a certificate of the High Court.

Put shortly, the nature and procedure of sales of teas was this ; that the teas were stored in the godowns at Willingdon Island which was in the State of Travancore-Cochin, samples of those teas, etc. were taken to Fort Cochin which at the relevant time was in the State of Madras. There by the samples the teas were sold by public auction in lots, some were purchased in their entirety and others in parts and after the consideration money was paid at Fort Cochin delivery orders were given to the buyers addressed to the godown keepers at Willingdon Island and actual delivery of tea was taken there. These teas were then sent out from Willingdon Island in Travancore-Cochin for consumption either in other parts of India or were exported out of India.

The taxability of the sales of teas in the manner above-mentioned will depend upon whether the sales can be held to have taken place at Willingdon Island *i.e.*, within the territory of Travancore-Cochin State and were liable to the imposition of sales tax under the Act or they were what for convenience are called "outside sales" and therefore not subject to sales tax in the State of Travancore-Cochin. The argument raised on behalf of the assessee company was that these sales were effected at Fort Cochin which was outside the territory of Travancore-Cochin and therefore were not liable to tax because of the ban imposed by Article 286 (1) (a) of the Constitution. That Article with the *Explanation* at the relevant time was as follows :

Article 286 (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place :—

(a) outside the State ; or

(b)

Explanation.—For the purpose of sub-clause (a) sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has, by reason of such sale or purchase passed in another State."

Under the Sale of Goods Act in an auction sale the title in goods passes and the sale is complete as soon as the hammer falls. The relevant portion of section 64 of the Sale of Goods Act dealing with sale by auction reads as follows :

"In the case of a sale by auction.....

(1) where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of the separate contract of sale ;

(2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in the customary manner ; and until such announcement is made any bidder may retract his bid."

Specific goods in section 2 (14) of the Sale of Goods Act means goods identified and agreed upon at the time the contract is made. Therefore on the fall of the hammer the offer is accepted and if the goods are specified goods the title passes to the buyer.

In the present case as soon as the hammer fell the title in the goods passed to the buyer as the goods were specific goods *i.e.*, goods which were auctioned in full lots and this event took place at Fort Cochin which was in the State of Madras. But in the case of unascertained goods the title in the goods does not pass to the buyer unless and until the goods are ascertained. It was for this reason that a distinction was drawn by the Sales Tax Appellate Tribunal between goods which were sold in full lots and those which were sold in portions. In regard to the former it was held that the title passed as soon as the hammer fell but not so in regard to the latter and therefore the sale of "full lots" was held to have taken place outside the State of Travancore-Cochin and of portions of lots inside that State. The case was consequently remanded to the Sales Tax Officer for determining the amount of the tax.

The High Court in revision held that the words in Article 286 (1) (a) "outside the State" do not mean transfer of ownership, according to the Sale of Goods Act but it was *lex situs* which determines the taxability of the transaction and the correct position is that the ownership in the goods is transferred according to the law of the place where the goods are situate. Therefore the sale in the present case was in the State of Travancore-Cochin and there is nothing in the *Explanation* to Article 286 (1) (a) which provides to the contrary.

It has been found and it has not been disputed that the title to the goods in the present case passed at Fort Cochin. The purchase money was paid there and the purchaser obtained from the auctioneer delivery notes directing the godown keepers at Willingdon Island to deliver the goods and only the actual physical delivery of the goods took place at Willingdon Island. In these circumstances the question is whether the sale was "outside" or "inside sale" as the expressions have been compendiously used in various judgments to indicate sales taking place

within a State or without it. The *Explanation* to Article 286 (1) (a) which has been set out above explains what a sale outside the State is. According to that *Explanation* a fiction is created as between two States, one where the goods are delivered for consumption in that State and the other where the title in the goods passed and the former is treated as the situs of the taxable event to the exclusion of the latter. Therefore where the *Explanation* applies the difficulty about the situs is resolved but in a case like the present one the difficulty still remains because the *Explanation* does not operate in the sense that the rival States claiming to tax the same taxable event are not the States of delivery for consumption in that State and those where the title in the goods passes. In somewhat similar circumstances this Court in *India Copper Corporation, Ltd. v. State of Bihar*¹ held by a majority decision that the opening words of Article 286 (1) which speak of a sale or purchase *taking place* and the *non-obstante* clause in the *Explanation* which refers to the general law relating to the sale of goods, indicated that it was the "passing of property within the State" that was intended to be fastened on, for the purpose of determining, whether the sale in question was "inside" or "outside" the State and therefore subject to the operation of the "*Explanation*", that State in which property passed would be the only State which would have the power to levy a tax on the sale. At page 286 it was observed :

"The conclusion reached therefore is that where the property in the goods passed within a State as a direct result of the sale, the sale transaction is not outside the State for the purpose of Article 286 (1) (a) unless the *Explanation* operates."

The majority decision in *India Copper Corporation, Ltd. v. State of Bihar*¹ concludes the point in favour of the appellant. On the facts of this case it was found by the Sales Tax Appellate Tribunal that in regard to the sales of tea in 'full lots' the property passed at Fort Cochin and this view has not been challenged in this Court. Therefore, on the majority decision in *India Copper Corporation, Ltd. v. State of Bihar*¹, the only State which would have the power to levy a tax on such sale would be the State of Madras and so far as Travancore-Cochin was concerned, the sale would be an outside sale.

In the present case therefore the sale was an "outside sale" and cannot be said to be an "inside sale" qua Travancore-Cochin because the title passed at Fort Cochin which is in the State of Madras. Apart from that money was paid there and the delivery order was also received there even though the actual physical delivery of goods was made at Willingdon Island in the State of Travancore-Cochin. The fiction created by the *Explanation* to Article 286 (1) (a) is inapplicable because there was no delivery as a direct result of sale for the purpose of consumption in any particular State.

There then remains the question of goods which were exported out of India from Willingdon Island. In the case of those goods also it cannot be said that there was a sale inside the State of Travancore-Cochin because the same considerations will apply to those sales as to the sales already discussed *i.e.*, goods the title to which passed at Fort Cochin were delivered at Willingdon Island and were delivered for consumption in parts of India other than Travancore-Cochin.

In our view therefore the High Court was in error and the appeal should therefore be allowed and the judgment and order of the High Court of Kerala set aside. The appellant will have its costs in this Court and in the High Court.

K.S.

Appeal allowed.

SHYAMLAL V. STATE OF U. P. (Imam, J.).

THE SUPREME COURT OF INDIA.
(Criminal Appellate Jurisdiction.)

PRESENT:—S. J. IMAM, K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Shyamlal
v.

... Appellant*

... Respondent.

The State of Uttar Pradesh

Railways Act (IX of 1890), section 121—Wilfully obstructs or impedes any railway servant in the discharge of his duty—What amounts to.

By majority: (Raghubar Dayal J. (dissenting): It is evident that the act alleged to have been done by the appellant threatening with a scythe and abusing a guard on the platform when the train was stopping at the station was done by him actuated by malice. It would therefore follow that the act was wilful within the meaning of section 121 of the Indian Railways Act, 1890.

While the train was standing at the platform the guard had to discharge multifarious duties (e.g.) he had to look after the loading of the parcels in the luggage van and to see that nothing untoward happened at the platform. It is not only when the train is in motion that a guard is on duty but also while the train is standing at the platform. The guard is on duty right up to the time when he was to be the guard of the train.

Per Raghubar Dayal, J. (dissenting): The expression "in the discharge of his duty" is not equivalent to the expression "when on duty". The obstruction or impediment caused to the railway servant in the discharge of his duty should result in an obstruction or impediment in the execution of the duty he was performing at the time. In the instant case there is nothing on record to show that what the guard was doing at the time amounted to his discharging some duty as a guard. The appellant's conduct was directed against Hukam Chand personally and not against his performing any official act in connection with the discharge of his duties. An offence under section 121 of the Railways Act is committed only when an accused commits an act with the intention of preventing the public servant from discharging his duty and the act does prevent him from doing so.

Appeal by Special Leave from the Judgment and Order dated 30th June, 1961, of the Allahabad High Court in Criminal Revision No. 971 of 1961.

D. S. Golani and K. L. Mehta, Advocates, for Appellant.

C. P. Lal, Advocate, for Respondent.

The Court delivered the following judgments

Imam, J.—(for the Majority) Appellant Shyamlal was convicted by the Honorary Railway Bench Magistrate, Tundla Bench, Agra, exercising First Class powers, for an offence punishable under section 121 of the Indian Railways Act and was sentenced to pay a fine of Rs. 60 and in case of default in the payment of fine, to two months' rigorous imprisonment. His appeal to the II Additional Sessions Judge, Agra was dismissed and his conviction and sentence were confirmed. He then filed Revision No. 971 of 1961 in the High Court of Judicature at Allahabad, but the same was also rejected by Mr. Justice Brij Lal Gupta. Against the Judgment of the High Court, he obtained Special Leave from this Court and has filed this appeal.

The appellant Shyamlal was a pointsman at Achhnera Railway Station. He bore grudge for some time against Hukam Chand Chaturvedi, P.W. 2, who was a Guard. The latter had taken in 1955 objection to a bed being carried on a passenger train by the appellant. Hukam Chand had also detected the appellant taking Railway line sleepers in a compartment, a portion of which was protruding out of the compartment, and made a report against the appellant, as a result of which he was transferred. It is alleged that on 30th November, 1959, Hukam Chand was on duty as a Guard on 20 Down train standing at the platform at Achhnera Railway Station at about 4-50 P.M. Suddenly the appellant came out from behind a compartment, armed with a scythe, and waving it in his hand in a menacing way told Hukam Chand that he would cut his neck, and hurled abuses on him thereby causing an obstruction in the discharge of his duty.

13th February, 1963.

* Criminal Appeal No. 9 of 1962.

P.W. 2, Hukam Chand Chaturvedi, narrated the entire prosecution case and his statement was corroborated in full by P.W. 3 R. L. Pandey, P.W. 4 Chanda Ram, P.W. 8 Maharaj Dutt and P.W. 9 Nisar, who were independent witnesses, and there is nothing at all to show that they are inimical to the appellant: On a careful consideration of the evidence, the Additional Sessions Judge, Agra, came to the conclusion that the prosecution have been successful in establishing its case and the appellant came out from behind a compartment, abused Hukam Chand and waved the scythe towards him in a menacing way shouting that he would cut his neck with it.

Section 121 of the Indian Railways Act states :

“ If a person wilfully obstructs or impedes any railway servant in the discharge of his duty, he shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.”

Mr. D. S. Golani, counsel for the appellant, contended that as the prosecution had failed to prove as to what duty was being actually performed by Hukam Chand, the appellant cannot be convicted under section 121 of the Indian Railways Act. In support of his contention the counsel relied on *Radha Kishan v. Emperor*¹, *Mohinder Singh v. The State*², *Jowand Mal v. The Crown*³, *In the matter of Baroda Kant Pramanick and Shibada Gati Pramanick*⁴ and *Emperor v. Popatlal Bhaichand Shah*⁵. He also relied upon Rules 113, 114, 115 and 137 of the Rules framed under the Indian Railways Act. The facts of all these cases were different from those of the present case and they can be easily distinguished. They have therefore no bearing on the decision of the present case.

From the facts stated above it is evident that the act alleged to have been done by the appellant was done by him, actuated by malice by reason of the fact that Hukam Chand had not spared him in the past for his lapses. It would follow, therefore, that this act was wilful within the meaning of section 121 of the Indian Railways Act. Further, Hukam Chand was on duty as a Guard on train 20 Down, which was then standing at the platform, and as a Guard he had to discharge multifarious duties at the time while the train was standing at the platform, e. g. he had to look after the loading of the parcels in the luggage van and to see that nothing untoward happened at the platform. Thus, it is clear, that during the time that the incident took place, viz., for about 15 minutes, he was obstructed from discharging his duty by this deliberate and wilful act on the part of the appellant, as it is not only when the train is in motion that a Guard is on duty, but also while the train is standing at the platform. We are, therefore, of the opinion that the appellant has wilfully created obstruction in the discharge of the public duty by Hukam Chand as a Guard.

Rules 93 to 103 of the Rules framed under certain sections of the Indian Railways Act, 1890, deal with the attendance, discipline and equipment of Staff Working Trains. In Rule 95, it is stated that the Guard shall be in charge of the train in all matters affecting stopping or movement of the train for traffic purposes. It is, therefore, clear that Hukam Chand was on duty as a Guard right up to the time when he was to be the Guard of the train, and the act of the appellant amounted to wilfully creating obstruction in the discharge of the public duty by Hukam Chand. The appellant was, therefore, rightly convicted under section 121 of the Indian Railways Act.

The appeal is accordingly dismissed.

Raghubar Dayal, J.—I am of opinion that the appellant is not guilty of the offence under section 121 of the Indian Railways Act, but is guilty of the offence under section 506, Indian Penal Code.

1. A.I.R. 1923 (Lahore) 71.

4. 1 C.W.N. 74.

2. A.I.R. 1953 S. C. 415.

3. I.L.R. 6 Lahore 467.

5. (1929) I.L.R. 54 Bom. 326.

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The finding of fact about the appellant's conduct at the time cannot be challenged before us in this appeal by Special Leave. The only question to determine is whether he, by his conduct, committed an offence under section 121 of the Act which reads:

"If a person wilfully obstructs or impedes any railway servant in the discharge of his duty he shall be punished with fine which may extend to one hundred rupees."

To establish the offence it is necessary to prove that the appellant acted wilfully and that his wilful action obstructed or impeded Hukam Chand in the discharge of his duty. The expression 'in the discharge of his duty' is not equivalent to the expression 'when on duty'. The obstruction or impediment, caused to the railway servant in the discharge of his duty, should result in an obstruction or impediment in the execution of the duty he was performing at the time. There is nothing on the record to indicate what Hukam Chand was doing at the time and, consequently, there is nothing on the record to show that what he was doing at the time amounted to his discharging some duty as a guard. The fact that he was on the platform about 40 minutes before the departure of the train does not necessarily lead to the inference that he must have been discharging some duty which he had to perform as a Guard of that train.

In this connection the Magistrate stated:

"..... there is not the least doubt that his conduct amounted to interference with the duties of the Guard who was ready to go with the train and much of his time was wasted in writing complaints."

The observation is based not on any findings, both with regard to the duties which were interfered with and with regard to the time taken in writing complaints. The report which Hukam Chand submitted to the Station Master is a brief one. It does not even give the time of the incident. It could not have taken long.

The learned Sessions Judge said in his judgment:

"So far as the question of obstruction is concerned it may be noted that Sri Hukam Chand was on duty as a Guard on train 20 Down, which was then standing at the platform. As a Guard he had to discharge multifarious duties at a time while the train was standing at the platform e.g., he had to look after the loading of the parcels in the luggage van and to see that nothing untoward happened at the platform. Thus during the time that the incident took place, viz., for about 15 minutes, he was obstructed from discharging his duty by this deliberate and wilful act on the part of the appellant."

Again, there is no reference to any particular duty which Hukam Chand was performing at the time. There was, according to Hukam Chand's deposition, a luggage Guard with the train, Ram Laxhan Pandey was the luggage Guard. It would be his duty to look to the loading of the luggage and not of Hukam Chand, the Guard of the train. It is too vague a statement to say that the Guard had to see that nothing untoward happened on the platform. Any way, the behaviour of Shyam Lal at the station in no way affected Hukam Chand's not discharging such a duty. He could go to the Senior Accounts Officer to make complaint to him and so he could have given effective orders or instructions in case anything happened at the platform.

Assuming, however, that Hukam Chand was discharging duty at the time, the question is whether what the accused actually did amounted to wilfully obstructing him in the discharge of that duty. The appellant threatened Hukam Chand with a scythe and shouted abuses at him. This conduct was not intended to cause obstruction to Hukam Chand in the discharge of his duty. The section contemplates the wilfulness of the alleged culprit to be with respect to the act of obstruction and not with respect to any other act. Ordinarily, the acts done would be intentional and therefore wilful. The intention to do a certain act, in no way directed towards the obstruction of a railway servant, will not be an act of wilful obstruction of the railway servant. The appellant's conduct was directed against Hukam Chand personally and not against his performing any official act, in connection with the discharge of his duties. He was not threatened in order

to prevent him from carrying out his duties and therefore the appellant cannot be said to have wilfully obstructed Hukam Chand in the discharge of his duty. Hukam Chand's conduct on being threatened is irrelevant for considering the nature of the appellant's wilful i.e. intentional act. What Hukam Chand did by way of making complaints to the Senior Accounts Officer or to the Station Master and which kept him away for a short time from discharging his normal duties as a guard at the station cannot be said to be what was intended by the appellant.

I may now refer to some cases whose *ratio decidendi* has a bearing on the present case.

In *Empress v. Badam Singh and another*¹ the execution of sale deed by the judgment-debtor was held not to amount to an obstruction of the sale in execution of the decree since the sale was not obstructed and did actually take place.

In the present case too, the train did go in time and there is no reason to suppose that Hukam Chand could not perform any of his necessary duties preliminary to the departure of the train.

In *Kishori Lal v. Emperor*² the patwari refused to allow the *kanungo* to go through his books and check them. He, in fact, went away with his books. Such a conduct was not held to be an offence under section 186, Indian Penal Code which makes voluntary obstruction to a public servant in the discharge of his public functions, an offence. In that case, the *kanungo* could not perform his duty on account of the conduct of the patwari and even then the patwari's conduct was held not to amount to a voluntary obstruction of the *kanungo* in the discharge of his duties. The rationale of the decision seems to be that the *kanungo* intended to perform his duties but was frustrated and that it was therefore not a case of any obstruction in the discharge of his duties.

In *Bastable v. Little*³ the accused, who had warned approaching cars about Constables having measured certain distances on the road and being on the watch in order to ascertain the speed at which cars passed over measured distances with a view to discovering whether they were proceeding at an illegal rate of speed, was held to be not guilty of the offence of obstructing the Constables when in the execution of their duty, within the meaning of section 2 of the Prevention of Crimes Amendment Act, 1885. Lord Alverstone, C.J., said at page 62:

"I think that the section points to something done in regard to the duty which the Constable is performing."

Ridley, J., said:

"I think that in order to constitute an offence under the section there must be some interference with the Constable himself by physical force or threats. He must be either physically obstructed in doing his duty or at least threats must be used to prevent him from doing it."

In *Betts v. Stevens*⁴ the accused who had done what the accused in *Bastable's Case*⁵ had done, was held to be guilty of the offence under section 2 of the Prevention of Crimes Amendment Act, 1885, as the warning had been given to cars which were actually proceeding at an excessive speed at the time the warning was given and who were expected to cover the measured distance at some excessive speed. Lord Alverstone, C.J., said at page 6:

"In my opinion a man who, finding that a car is breaking the law, warns the driver, so that the speed of the car is slackened, and the police are thereby prevented from ascertaining the speed and so are prevented from obtaining the only evidence upon which, according to our experience, Courts will act with confidence, is obstructing the police in the execution of their duty. This is exactly the kind of case that I had in my mind when the case of *Bastable v. Little* was before us, and which led me, after Ridley, J., had, as I thought, put too narrow a construction on the word 'obstruct', to say that I could not

1. (1883) 3 All. W. N. 197.

3. L.R. (1907) 1 K. B. 59.

2. A.I.R. 1925 All. 409.

4. L.R. (1910) 1 K. B. 1.

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agree in the view that physical obstruction or threats were the only kinds of acts that would come within the section. However, nothing that I now say must be construed to mean that the mere giving of a warning to a passing car that the driver must look out as there is a police trap ahead will amount to an obstruction of the police in the execution of their duty in the absence of evidence that the car was going at an illegal speed at the time of the warning given; but where it is found, as in this case, that the cars were already breaking the law at the time of the warning, and that the act of the person giving the warning prevented the police from getting the only evidence which would be required for the purposes of the case, there I think the warning does amount to obstruction."

Darling, J., said at page 8:

"The appellant in effect advised the drivers of those cars which were proceeding at an unlawful speed not to go on committing an unlawful act. If that advice were given simply with a view to prevent the continuance of the unlawful act and procure observance of the law, I should say that there would not be an obstruction of the police in the execution of their duty of collecting evidence beyond the point at which the appellant intervened. The gist of the offence to my mind lies in the intention with which the thing is done."

I have made reference to these observations to indicate that a necessary element of a person's wilfully obstructing a public servant in the discharge of his duties is that person's actual intention in doing the act which is alleged to constitute the offence and the intention must be to prevent the public servant from discharging his duty. The result of the act should be that the public servant is actually obstructed in the discharge of his duty, *i.e.*, the public servant is not able to perform his duty. I am therefore of opinion that an offence under section 121 of the Act is committed only when an accused commits an act with the intention of preventing the public servant from discharging his duty and the act does prevent him from doing so.

It has been further urged for the appellant that threats of violence cannot amount to obstructing Hukam Chand in the discharge of his duty. The appellant merely uttered threats and therefore committed no offence under section 121 of the Act. I am of opinion that threats of violence can amount to obstructing a public servant in the discharge of his duty, if the attitude of the person holding out the threats indicates that violence would be used if the public servant persisted in performing his duty, and approve of what was said by Costello, J., in *Nafar Sardar v. Emperor*¹ and was approved in *Emperor v. Tohfa*² whose facts were similar.

In *Nafar Sardar case*¹ the naib nazir deputed to execute the decree against the accused by attachment of their movable property, proceeded to enter their house in order to attach the movables. A number of persons collected and some of them, including the accused, declared that they would kill or break the head of anybody coming into their house to attach the movables. Due to such attitude, no attachment could be effected. In holding the accused guilty of the offence under section 186, Indian Penal Code, Costello, J., said:

"No doubt, in some instances, mere threats may not of themselves be sufficient. The real question is whether the action or attitude on the part of the person alleged to have obstructed a public servant in the performance of his functions was of such a nature as to obstruct, that is to say, to stand in the way so as to prevent him in carrying out the duties which, he had to discharge. Where it is solely a matter of threats, they must be of such a nature as so to affect the public servant concerned as to cause him to abstain from proceeding with the execution of his duties. It seems to be obvious that threats of violence, made in such a way as to prevent a public servant from carrying out his duty, would easily amount to an obstruction of the public servant, particularly if such threats are coupled with an aggressive or menacing attitude on the part of the persons uttering the threats and still more so if they are accompanied by the flourishing or even the exhibition of some kind of weapon capable of inflicting physical injury. Threats made by a person holding an offensive weapon in his hand must be taken to be just as much an obstruction as that caused by a person actually blocking a gateway or handling a public servant in a manner calculated to prevent him from executing his duty."

In view of the facts of the present case, the appellant's conduct in giving threats to Hukam Chand, the Guard, at the station does not amount to an offence under section 121 of the Act but makes out an offence under section 506, Indian

Penal Code. I would therefore alter the conviction of the appellant for an offence under section 121 of the Act to one under section 506, Indian Penal Code and maintain the sentence of Rs. 60 fine in default of payment of which he would undergo rigorous imprisonment for two months.

ORDER.

Following the opinion of the majority, the appeal is dismissed.

K. L. B.

Appeal dismissed.

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction).

PRESENT:—P. B. GAJENDRAGADKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

The Tata Oil Mills Co., Ltd.

.. *Appellant**

v.

The Workmen

.. *Respondents.*

Industrial Dispute—Jurisdiction and authority of Labour Court in cases where the order of discharge passed by an employer gives rise to an Industrial dispute.

Where an order of discharge passed by an employer gives rise to an Industrial Dispute, the form of the order by which the employee's services are terminated would not be decisive; industrial adjudication would be entitled to examine the substance of the matter and decide whether the termination is in fact discharge simpliciter or it amounts to dismissal which has put on the cloak of a discharge simpliciter. The test always has to be whether the act of the employer is *bona fide* or not. If the act is *mala fide* or appears to be a colourable exercise of the powers conferred upon the employer either by the terms of the contract or by the Standing Orders, then, notwithstanding the form of the order, industrial adjudication would examine the substance and would direct reinstatement in a fit case

In the instant case, on a consideration of the evidence, it is difficult to understand how the Labour Court, could have come to the conclusion that the order of discharge was not justified.

Buckingham & Carnatic Co., Ltd. etc. v. Workers of the Company, etc., (1951) II L.L.J. 314.

Chartered Bank, Bombay v. Chartered Bank Employees' Union and another, (1960) II L.L.J.222.

V. B. Dutt & Co., (Private) Ltd. v. Its Workmen, (1962) I L.L.J. 374, referred to

Appeal by Special Leave from the Award dated 13th September, 1961, of the Second Labour Court, West Bengal in Case No. VIII-C-40 of 1960.

M. C. Setalvad, Senior Advocate, J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him, for Appellant.

C. K. Daphtary, Solicitor General of India, Janardan Sharma, Advocate, with him, for Respondent No. 1.

The Judgment of the Court was delivered by

Gajendragadkar, J.—Mr. R. K. Banerjee had been employed by the appellant, the Tata Oil Mills Co., Ltd. as a salesman on the 3rd April, 1956, as a probationer and he was confirmed on the 5th November, 1956. On the 5th of December, 1959, his services were terminated and he was informed that the appellant had lost confidence in him and so, it has decided to discharge him. Accordingly, in lieu of notice, he was paid a month's salary and was told that he ceased to be the employee of the appellant as from the date next (after he received the order from the appellant). The discharge of Mr. Banerjee was resented by the Union to which he belonged and the Union took up his case. Since the dispute could not be settled amicably, the Union succeeded in persuading the Government of West Bengal to refer the dispute for adjudication to the Second Labour Court on the ground that the said discharge was not justified. That is how the discharge of Mr. Banerjee became an industrial dispute between the appellant and the respondents, its workmen represented by their Union. The Labour Court which tried the dispute came to the conclusion that the appellant had failed to

* Civil Appeal No. 322 of 1962.

1] justify the discharge of Mr. Banerjee and so, it has directed the appellant to reinstate him and pay him full emoluments from the date of his discharge up to the date of his reinstatement. It is this order which is challenged by the appellant by its present appeal brought to this Court by Special Leave.

The material facts leading to the termination of Mr. Banerjee's services lie within a very narrow compass. In November, 1959, Mr. Banerjee was working in the Assam area and as such, had to work as a Salesman at Dhubri, Bongaigoan Rangia and Tejpur. The appellant expected that as its Salesman Mr. Banerjee should visit dealers in his area and carry on intelligent and intensive propaganda to popularise the sale of the appellant's products. The appellant has a Sales Office in Calcutta and the manager of the said office visits the areas within his jurisdiction to inspect the work of Salesman. Accordingly, Mr. Gupta who was then the manager of the Calcutta Office visited the area assigned to Mr. Banerjee, in the last week of October. He found that Mr. Banerjee was not working satisfactorily as a Salesman. In particular, he noticed that whereas Mr. Banerjee had reported to the Office that the Bongaigoan Stockists had 20 boxes of dried up and deshaped 501 Special Soap which could not be distributed in the market, he had in fact not opened a single box and had not cared to satisfy himself that the soap had either dried up or had been deshaped. In fact, Mr. Gupta found that the boxes were in tact and he opened them and discovered that five boxes contained soap which had dried up and had become deshaped, whereas the 15 other boxes were in good condition. Thereupon, Mr. Gupta made a report to the zonal Manager on the 2nd November, 1959, adversely commenting on Mr. Banerjee's work. The said report was in due course forwarded to the Head Office in Bombay. The Head Office then instructed the Calcutta Sales Office by telephone to send for Mr. Banerjee and call for his explanation. Accordingly, Mr. Banerjee was sent for and his explanation taken; Mr. Gupta then made another report expressing his dissatisfaction with the explanation given by Mr. Banerjee. This report was sent on the 24th November, 1959. The Head Office accepted this report and on the 5th December, 1959, issued to Mr. Banerjee the order terminating his services. That, in brief, is the case set out by the appellant in support of the action taken by it against Mr. Banerjee.

The appellant had alleged that the termination of Mr. Banerjee's services was not dismissal but was a discharge simpliciter, and according to it, this discharge was justified by the terms of contract between the appellant and Mr. Banerjee as embodied in Rule 40 (1) of the Service Rules of the appellant. The appellant, therefore, urged that the Labour Court had no jurisdiction to consider the propriety of the appellant's action in discharging Mr. Banerjee.

The respondents, on the other hand, contended that the discharge was not discharge simpliciter but was, in substance, dismissal, and so, it was urged that the Labour Court was entitled to consider the propriety of the appellant's action. Basing themselves on the plea that the discharge amounted to dismissal, the respondents pleaded that the failure of the appellant to hold an enquiry against Mr. Banerjee introduced a serious infirmity in the order passed against him; and they argued that the conduct of the appellant was *mala fide* and the dismissal of Mr. Banerjee amounted to victimisation.

The Labour Court has found that according to the terms of contract under which Mr. Banerjee was employed by the appellant, the appellant was entitled to discharge Mr. Banerjee from its employment under Rule 40 (1) of the Service Rules; but it held that merely because the order served on Mr. Banerjee purported to be an order of discharge, that would not exclude the jurisdiction of the Labour Court to examine the substance of the matter. In fact, Mr. Joshi who appeared for the appellant conceded before the Labour Court that an adjudicating Court can look into the reasons behind the discharge of an employee. That is why evidence was led by both the parties before the Labour Court. Having consi-

dered that evidence, the Labour Court has found that the respondent's plea about the *mala fides* of the appellant was not proved and it held that the termination of Mr. Banerjee's services could not be said to amount to an act of victimisation or an unfair labour practice. Even so, it held that the discharge was not justified, and so, it has directed the appellant to reinstate Mr. Banerjee. It is the validity of this order that is challenged before us by Mr. Setalvad on behalf of the appellant.

The true legal position about the Industrial Court's jurisdiction and authority in dealing with cases of this kind is no longer in doubt. It is true that in several cases, contracts of employment or provisions in Standing Orders authorise an industrial employer to terminate the services of his employees after giving notice for one month or paying salary for one month in lieu of notice, and normally, an employer may, in a proper case, be entitled to exercise the said power. But where an order of discharge passed by an employer gives rise to an industrial dispute, the form of the order by which the employee's services are terminated, would not be decisive; industrial adjudication would be entitled to examine the substance of the matter and decide whether the termination is in fact discharge simpliciter or it amounts to dismissal which has put on the cloak of a discharge simpliciter. If the Industrial Court is satisfied that the order of discharge is punitive, that it is *mala fide*, or that it amounts to victimisation or unfair labour practice, it is competent to the Industrial Court to set aside the order and in a proper case, direct the reinstatement of the employee. In some cases, the termination of the employee's services may appear to the Industrial Court to be capricious or so unreasonably severe that an inference may legitimately and reasonably be drawn that in terminating the services, the employer was not acting *bona fide*. The test always has to be whether the act of the employer is *bona fide* or not. If the act is *mala fide*, or appears to be a colourable exercise of the powers conferred on the employer either by the terms of contract or by the Standing Orders, then notwithstanding the form of the order, industrial adjudication would examine the substance and would direct reinstatement in a fit case. This position was recognised by the Labour Appellate Tribunal as early as 1951 in *Buckingham & Carnatic Co., Ltd., etc. v. Workers of the Company, etc.*¹ and since then, it has been consistently followed vide *Chartered Bank, Bombay v. Chartered Bank Employees' Union and another*² and *U. B. Dutt & Co. (Private), Ltd. v. Its Workmen*³.

In the present case, the Labour Court has made a definite finding in favour of the appellant that its action in terminating the services of Mr. Banerjee was not *mala fide* and did not amount to victimisation. Even so, it proceeded to examine the propriety of the said action and came to the conclusion that Mr. Banerjee's discharge from employment did not appear to it to be justified. In coming to this conclusion, the Labour Court has given some reasons which are clearly unsupportable. It has observed, for instance, that the appellant has not produced any documentary evidence in support of its allegation against the efficiency of Mr. Banerjee. This is clearly wrong because the two reports made by Mr. Gupta in respect of Mr. Banerjee's conduct do amount to documentary evidence which cannot be lightly brushed aside. It has then commented on the fact that the allegations made by Mr. Gupta against Mr. Banerjee on six counts are of a general character. This comment again cannot be justified because Mr. Gupta stated in clear terms the defects in Mr. Banerjee's work which had come to his notice. These defects are specific and it is idle to refuse to give importance to this evidence merely on the ground that no specific instances had been cited. In regard to the question as to whether the 20 boxes had been opened by Mr. Banerjee before he made his report to the Zonal Office, the Labour Court has observed that on this point, there is the evidence of Mr. Banerjee against that of Mr. Gupta and there

1. (1951) II L.L.J. 314.

3. (1962) I L.L.J. 374.

2. (1950) 3 S.C.R. 441; (1950) II L.L.J. 222.

was no particular reason to believe one in preference to the other. Now, it is clear that such an observation is hardly of any help because it was necessary for the Labour Court to express its conclusion on this point; it might have believed either Mr. Banerjee or Mr. Gupta, but by saying that there is no reason why one should be believed rather than the other, the Labour Court left this part of the dispute entirely undecided. Similarly, the Labour Court has accepted the fact that Mr. Gupta had called for and received Mr. Banerjee's explanation and to that extent it has rejected Mr. Banerjee's suggestion that he had not given any explanation at all; but even so, the Labour Court has not considered the effect of this conclusion on the main controversy between the parties. In our opinion, therefore, the reasons given by the Labour Court in support of its conclusion that the discharge of Mr. Banerjee was not justified are wholly unsatisfactory and so, it has become necessary for us to examine the evidence ourselves.

The first report made by Mr. Gupta expressly states six grounds on which Mr. Banerjee's work was found to be unsatisfactory. Mr. Gupta took the view that Mr. Banerjee was very slow in his work as a Salesman, that he was not able to judge the capacity of the dealers and to give them sufficient stocks in time, that he took no steps to put the products of the appellant on prominent view in the dealers' shops, that he was not looking after the pasting of the posters, in fact in one place the poster was pasted upside down, that he was not educating the stockists and dealers as he could have done and that he was reluctant to put hard and intelligent work. It is remarkable that when Mr. Banerjee was asked about this report in cross-examination, he frankly stated that Mr. Gupta was not unfriendly towards him and he was really unable to say why Mr. Gupta should have made these adverse comments against his work. In fact, the Labour Court itself has found that the appellant was not actuated by any ulterior consideration in discharging Mr. Banerjee. This report was made by Mr. Gupta soon after he inspected Mr. Banerjee's work and there is no reason whatever why the Labour Court should have been reluctant to accept this report.

Confining ourselves to the main complaint against Mr. Banerjee that he had not examined even a single box before he reported that the contents of the said boxes were not marketable, Mr. Gupta expressly stated that he had seen the 20 boxes and found that none of them had been opened at all. They were in tact in the company's packing with the straps on them. Mr. Gupta got them opened and found that the contents to the extent of 5 cases were really damaged and that the remaining contents were all right and could be marketed at the company's prices. Mr. Banerjee stated in his evidence that he had all the cases opened and he added, as he had to, that the said cases were repacked for avoiding further deterioration. When he was asked how that could be done, he agreed that the metal straps had to be removed for opening of the boxes, but he added that he had arranged to have them restrapped and nailed. It is clear that the strapping is done in a factory by machines. Mr. Banerjee however, suggested that he could manage to get the straps put and nailed with hands. This evidence is patently unreliable. Besides, it is significant that when he gave his explanation to Mr. Gupta, Mr. Banerjee admitted that he had opened only 5 or 6 out of the 20 boxes in question, though his report suggested that he had opened all the 20 boxes. Therefore, there can be no doubt that Mr. Gupta's statement is absolutely true and that Mr. Banerjee had made his report about the unsatisfactory condition of the contents of the 20 boxes without as much as opening any one of them. That being so, it is difficult to understand how the Labour Court could have come to the conclusion that the order of discharge was not justified.

The learned Solicitor-General, however, attempted to argue that there was nothing on the record to show that the 20 boxes which Mr. Gupta got opened were the same boxes in respect of which Mr. Banerjee had made his report. We do not think that having regard to the evidence given by Mr. Gupta and Mr. Banerjee and the explanation offered by the latter when he was called to

Calcutta by Mr. Gupta, there is any room for such an ingenious suggestion: Both parties knew that they were talking about the same 20 boxes and so, it is futile now to suggest that the 20 boxes which Mr. Gupta examined were different from the boxes in respect of which Mr. Banerjee had made his report. It was also suggested on behalf of the respondents that Mr. Gupta did not admit that he had received some letters from Mr. Banerjee in which he had complained that owing to heavy rains, conditions were not favourable for effective work in the area entrusted to him. It is true that when Mr. Gupta was asked about these letters he said he did not remember if he had received them. We do not think that the answers given by Mr. Gupta in respect of these letters can be of any assistance to the respondents in discrediting Mr. Gupta's evidence in any manner. On the whole, we have no hesitation in holding that the appellant acted *bona fide* in discharging Mr. Banerjee's services when it accepted Mr. Gupta's report and concurred with his conclusions that the explanation given by Mr. Banerjee was not satisfactory.

The result is, the appeal is allowed and the order passed by the Labour Court directing the appellant to reinstate Mr. Banerjee is set aside. In the circumstances, of the case, there would be no order as to costs.

K.L.B.

Appeal allowed.

THE SUPREME COURT OF INDIA (Criminal Appellate Jurisdiction)

PRESENT:—K. SUBBA RAO, RAGHUBAR DAYAL, AND J. R. MUDHOLKAR, JJ.

Mst. Jagir Kaur and another

.. Appellants*

v.

Jaswant Singh

.. Respondent.

Criminal Procedure Code (V of 1898), section 488 (8)—Construction of.

Chapter XXXVI of the Criminal Procedure Code (V of 1898) providing for the maintenance of wives and children intends to serve a social purpose. Section 488 of the Code prescribes alternative forums to enable a deserted wife or a helpless child, legitimate or illegitimate to get urgent relief. Proceedings under the section can be taken against the husband or the father, as the case may be, in a place where he resides permanently or temporarily or where he last resided in any district in India or where he happens to be at the time the proceedings are initiated.

The context and purpose of the present statute certainly do not compel the importation of the concept of domicile in its technical sense. The juxtaposition of the words "is" and "last resided" in the sub-section also throw light on the meaning of the word "resides". The word "is" confers jurisdiction on a Court on the basis of a casual visit. The word "resides" cannot be given a meaning different from the word "resided" in the expression "last resided" and therefore the wider meaning fits in the setting in which the word "resides" appears. The purpose of the statute would be better served if the word "resides" was understood to include temporary residence.

Appeal by Special Leave from the Judgment and Order dated the 22nd May, 1961 of the Punjab High Court in Criminal Revision No. 1448 of 1960.

S. K. Kapur, Advocate, (*amicus curiae*), for Appellants.

Harnam Singh Chadha and Harbans Singh, Advocates for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave raises the question of true construction of section 488 (8) of the Code of Criminal Procedure.

Jagir Kaur, the first wife of Jaswant Singh, was married to him in 1930. The said Jaswant Singh was employed in the police force in Africa. The *Maklawa* ceremony took place about 7 years after the marriage, when the respondent was away in Africa. Thereafter, the first appellant was taken to her mother-in-law's house, and after living there for a few years she returned to her parental house.

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Five or six years thereafter, Jaswant Singh came to India on 5 months' leave and the couple lived in Jaswant Singh's or his mother's house at Hans Kalan—it is not clear to whom the house belongs—for a period of 5 months and thereafter Jaswant Singh left for Africa. Before going to Africa, Jaswant Singh married another wife and took her with him to Africa. After 5 or 6 years, he came back to India on leave and took the first appellant also to Africa. There she gave birth to a daughter, the second appellant. As disputes arose between them, he sent her back to India, promising to send her money for her maintenance but did not do so. In the year 1960, he came back to India. It is also in evidence that he had purchased property in Ludhiana District for Rs. 25,000/-. When he was admittedly in India, the first appellant filed a petition under section 488 of the Code of Criminal Procedure in the Court of the First Class Magistrate, Ludhiana, within whose jurisdiction the respondent was staying at that time. The petition was filed by the first appellant on behalf of herself and also as lawful guardian of the second appellant, who was a minor, claiming a maintenance at Rs. 200/- per month for both of them on the ground that the respondent deserted them and did not maintain them. The respondent filed a counter-affidavit denying the allegations and pleading that the said Court had no jurisdiction on the ground that he never resided within its District nor did he last reside with the first appellant in any place within its jurisdiction. The learned Magistrate held that the petitioner-appellant was the wife of the respondent and that the Court had jurisdiction to entertain the petition as the husband and wife last resided together in the District of Ludhiana. On the merits, he held that the first wife and her daughter were entitled to maintenance and awarded for the wife maintenance at the rate of Rs. 100/- per month and for the daughter at the rate of Rs. 50/- per month. The respondent preferred a revision against that order to the Additional Sessions Judge, Ludhiana and the learned Additional Sessions Judge agreed with the learned Magistrate both on the question of jurisdiction and also on the right to maintenance and dismissed the revision. The husband preferred a revision to the High Court of Punjab against that order. The High Court disagreed with both the lower Courts on the question of jurisdiction. It held that the husband's permanent home was Africa and his two visits to Ludhiana for temporary periods did not make him one who resided in that district or who last resided with his wife therein. On that view, it set aside the order of the learned Additional Sessions Judge and dismissed the petition. Hence the present appeal.

Mr. Kapur, learned Counsel for the appellants, contended that the respondent had last resided with his wife in his house in village Hans Kalan in the District of Ludhiana and was also in the said District at the time the application under Section 488 of the Code of Criminal Procedure was filed by the first appellant and, therefore, the learned Magistrate had territorial jurisdiction to entertain the application. In any view, he argued, the respondent submitted to the jurisdiction of the Magistrate and, therefore, he could no longer question the validity of his order on the ground of want of jurisdiction. On the other hand, the learned Counsel for the respondent sought to sustain the order of the High Court for the reasons mentioned therein.

At the outset we must say that the first appellant did not raise the plea of submission either in the pleadings or in any of the three Courts below. The question is a mixed question of fact and law. This Court will not ordinarily allow such questions to be raised for the first time before it and we do not see in this case any exceptional circumstances to depart from that practice. We cannot, therefore, permit the first appellant to raise this belated plea.

The only question in the appeal is whether the Magistrate of Ludhiana had jurisdiction to entertain the petition filed under Section 488 of the Code of Criminal Procedure. The question turns upon the interpretation of the relevant provisions of section 488 (8) of the Code, which demarcates the jurisdictional

limits of a Court to entertain a petition under the said section. Section 488 (8) of the Code reads :

"Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child."

The crucial words of the sub-section are, "resides", "is" and "where he last resided with his wife". Under the Code of 1882 the Magistrate of the District where the husband or father, as the case may be, resided only had jurisdiction. Now the jurisdiction is wider. It gives three alternative forums. This, in our view, has been designedly done by the Legislature to enable a discarded wife or a helpless child to get the much needed and urgent relief in one or other of the three forums convenient to them. The proceedings under this section are in the nature of civil proceedings; the remedy is a summary one and the person seeking that remedy, as we have pointed out, is ordinarily a helpless person. So the words should be liberally construed without doing any violence to the language.

The first word is "resides". A wife can file a petition against her husband for maintenance in a Court in the District where he resides. The said word has been subject to conflicting judicial opinion. In the Oxford Dictionary it is defined as: "dwell permanently or for a considerable time; to have one's settled or usual abode; to live in or at a particular place." The said meaning, therefore, takes in both a permanent dwelling as well as a temporary living in a place. It is, therefore, capable of different meanings, including domicile in the strictest and the most technical sense and a temporary residence. Whichever meaning is given to it, one thing is obvious and it is that it does not include a casual stay in, or a flying visit to a particular place. In short, the meaning of the word would, in the ultimate analysis, depend upon the context and the purpose of a particular statute. In this case the context and purpose of the present statute certainly do not compel the importation of the concept of domicile in its technical sense. The purpose of the statute would be better served if the word "resides" was understood to include temporary residence. The juxtaposition of the words "is" and "last resided" in the sub-section also throws light on the meaning of the word "resides". The word "is", as we shall explain later, confers jurisdiction on a Court on the basis of a casual visit and the expression "last resided", about which also we have something to say, indicates that the Legislature could not have intended to use the word "resides" in the technical sense of domicile. The word "resides" cannot be given a meaning different from the word "resided" in the expression "last resided" and, therefore, the wider meaning fits in the setting in which the word "resides" appears. A few of the decisions cited at the Bar may be useful in this context.

In *Sampoornam v. N. Sundaresan*¹, it was held that the word "resides" implied something more than a brief visit but not such continuity as to amount to a domicile. In *Khairunissa v. Bashir Ahmed*², on a consideration of the relevant authorities, it was pointed out that a casual or a flying visit to a place was excluded from the scope of the word "resides". A Full Bench of the Allahabad High Court, in *Flowers v. Flowers*³, expressed the view that a mere casual residence in a place for a temporary purpose with no intention of remaining was not covered by the word "resides". In *Balakrishna v. Sakuntala Bai*⁴ it was held that the expression "reside" implied something more than "stay" and implied some intention to remain at a place and not merely to pay it a casual visit. In *Charan Das v. Surasti Bai*⁵, it was held that the sole test on the question of residence was whether a party had *animus manendi*, or an intention to stay for an indefinite period, at one

1. (1952) 2 M.L.J. 573.

2. (1929) I.L.R. 53 Bom. 781.

3. (1910) I.L.R. 32 All. 203.

4. (1942) 2 M.L.J. 134 : A.I.R. 1942 Mad. 666.

5. A.I.R. 1940 Lah. 449.

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place; and if he had such an intention then alone could he be said to "reside" there.

The decisions on the subject are legion and it would be futile to survey the entire field. Generally stated no decision goes so far as to hold that "resides" in the sub-section means only domicile in the technical sense of that word. There is also a broad unanimity that it means something more than a flying visit to or a casual stay in a particular place. They agree that there shall be *animus manendi*, or an intention to stay for a period, the length of the period depending upon the circumstances of each case. Having regard to the object sought to be achieved, the meaning implicit in the words used and the construction placed by decided cases thereon, we would define the word "resides" thus: a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case. Some illustrations may make our meaning clear: (1) *A*, living in a village, goes to a nearby town *B* to attend a marriage or to make purchases and stays there in a hotel for a day or two. (2) *A*, a tourist, goes from place to place during his peregrinations and stays for a few days in each of the places he visits. (3) *A*, a resident of a village, who is suffering from a chronic disease, goes along with his wife to a town for medical treatment, takes a house and lives there for about 6 months. (4) *A*, a permanent resident of a town, goes to a city for higher education, takes a house and lives there, alone or with his wife, to complete his studies. In the first two cases, *A* makes only a flying visit and he has no intention to live either permanently or temporarily in the places he visits. It cannot, therefore, be said that he "resides" in the places he visits. In the last two illustrations, though *A* has a permanent house elsewhere, he has a clear intention or *animus manendi* to make the places where he has gone for medical relief in one and studies in the other his temporary abode or residence. In the last two cases it can be said that though he is not a domicile of those places; he "resides" in those places.

The cognate expression "last resided" takes colour from the word "resides" used earlier in the sub-section. The same meaning should be given to the word "resides" and the word "resided", that is to say, if the word "resides" includes temporary residence, the expression "last resided" means the place where the person had his last temporary residence. But it is said that even on that assumption, the expression can only denote the last residence of the person with his wife in any part of the world and that it is not confined to his last residence in any part of India. If the words, "where he last resided with his wife" are construed in vacuum, the construction suggested by the learned Counsel for the respondent may be correct; but by giving such a wide meaning to the said expression we would be giving extra territorial operation to the Code of Criminal Procedure. Section 2 (1) of the Code extends the operation of the Code to the whole of India except the States of Jammu and Kashmir; that is to say, the provisions of the Code, including section 488 (8) thereof, have operation only throughout the territory of India, except the States of Jammu and Kashmir. If so, when sub-section (8) of section 488 of the Code, prescribing the limits of jurisdiction, speaks of the last residence of a person with his wife it can only mean his last residence with his wife in the territories of India. It cannot obviously mean his residing with her in a foreign country, for an Act cannot confer jurisdiction on a foreign Court. It would, therefore, be a legitimate construction of the said expression if we held that the District where he last resided with his wife must be a District in India.

In *In re Drucker (No.2)* *Basden, ex parte*¹ the words "or in any other place out of England," in sub-section (5) of section 27 of the Bankruptcy Act, 1883, fell to be construed. The words were wide enough to enable a Court in England to order that any person who, if in England, would be liable to be brought before it under

the section, shall be examined in any place out of England, including a place not within the jurisdiction of the British Crown. The Court held that the words must be read with some limitation and the jurisdiction conferred by that section does not extend to places abroad which are not within the jurisdiction of the British Crown. Wright, J., rejecting the wider construction sought to be placed on the said words, observed at page 211.

"It seems to me that that restriction is *prima facie* necessary. It is impossible to suppose that the Legislature intended to empower the Court to order the examination of persons in foreign countries; for instance, in France or Germany."

In Halsbury's Laws of England, Vol. 36, 3rd edn., at page 429, it is stated:

"..... the presumption is said to be that Parliament is concerned with all conduct taking place within the territory or territories for which it is legislating in the particular instance, and with no other conduct. In other words, the extent of a statute, and the limits of its application, are *prima facie* the same."

It may be mentioned that the said observations are made in the context of Parliament making a law in respect of a part of the territory under its legislative jurisdiction. If it has no power at all to make a law in respect of any foreign territory, the operation of the law made by it cannot obviously extend to a country over which it has no legislative control. It is, therefore, clear that section 488 (8) of the Code, when it speaks of a District where a person last resided with his wife, can only mean "where he last resided with his wife in any District in India other than Jammu and Kashmir".

The third expression is the word "is". It is inserted between the words "resides" and "last resided". The word, therefore, cannot be given the same meaning as the word "resides" or the expression "last resided" bears. The meaning of the word is apparent if the relevant part of the sub-section is read. It reads: "Proceedings under this section may be taken against any person in any District where he.....is....." The verb "is" connotes in the context the presence or the existence of the person in the District when the proceedings are taken. It is much wider than the word "resides": it is not limited by the *animus manendi* of the person or the duration or the nature of his stay. What matters is his physical presence at a particular point of time. This meaning accords with the object of the chapter wherein the concerned section appears. It is intended to reach a person, who deserts a wife or child leaving her or it or both of them helpless in any particular District and goes to a distant place or even to a foreign country, but returns to that District or a neighbouring one on a casual or a flying visit. The wife can take advantage of his visit and file a petition in the District where he is during his stay. So too, if the husband who deserts his wife, has no permanent residence, but is always on the move, the wife can catch him at a convenient place and file a petition under section 488 of the Code. She may accidentally meet him in a place where he happens to come by coincidence and take action against him before he leaves the said place. This is a salutary provision intended to provide for such abnormal cases. Many illustrations can be visualized where the utility of that provision can easily be demonstrated.

To summarize: Chapter XXXVI of the Code of Criminal Procedure providing for maintenance of wives and children intends to serve a social purpose. Section 488 prescribes alternative forums to enable a deserted wife or a helpless child, legitimate or illegitimate, to get urgent relief. Proceedings under the section can be taken against the husband or the father, as the case may be, in a place where he resides, permanently or temporarily, or where he last resided in any District in India or where he happens to be at the time the proceedings are initiated.

Let us now apply the said principles to the instant case. To recapitulate the relevant facts: the respondent was born in India in Ludhiana District; he was married to the first appellant in the year 1930; he migrated to Africa and took

up a job there as a police officer, he came back to India in or about 1943 and lived with the first appellant in a house at Hans Kalan for about 5 months and thereafter he left again for Africa, 5 or 6 years thereafter, he again came to India on leave and took her to Africa where she gave birth to a daughter; the appellant was sent back to India and she was staying in Ludhiana District with the child; the respondent's mother is staying in the aforesaid village in the same District and it is also not disputed that the respondent has purchased property worth Rs. 25,000/- in Ludhiana District in the name of his minor children by his second wife; when the petition was filed he was admittedly in the District of Ludhiana — indeed, notice was served on him in that District, he filed a counter-affidavit, obtained exemption from personal appearance at the time of hearing and thereafter left for Africa. It is not necessary in this case to express our opinion on the question whether on the said facts the respondent "resides" in India; but we have no doubt that he "last resided" in India. We have held that temporary residence with *animus manendi* will amount to residence within the meaning of the provisions of the sub-section. When the respondent came to India and lived with his wife in his or in his mother's house in village Hans Kalan, he had a clear intention to temporarily reside with his wife in that place. He did not go to that place as a casual visitor in the course of his peregrinations. He came there with the definite purpose of living with his wife in his native place and he lived there for about 6 months with her. The second visit appears to be only a flying visit to take her to Africa. In the circumstance we must hold that he last resided with her in a place within the jurisdiction of the First Class Magistrate, Ludhiana. That apart, it is admitted that he was in a place within the jurisdiction of the said Magistrate on the date when the appellant filed her application for maintenance against him. The said Magistrate had jurisdiction to entertain the petition, as the said proceedings can be taken against any person in any District where he "is". We, therefore, hold that the First Class Magistrate, Ludhiana, had jurisdiction to entertain the petition under section 488 (8) of the Code.

The next question relates to the quantum of maintenance to be awarded to the appellants. The Magistrate, on a consideration of the entire evidence, having regard to the salary of the respondent, and the value of the property he purchased, awarded maintenance to the wife at the rate of Rs. 100/- per month for herself and at the rate of Rs. 50/- per month for the maintenance of her minor child. The Additional Sessions Judge, on a reconsideration of the evidence, accepted the finding of the learned Magistrate and confirmed the quantum of maintenance awarded by him. The finding is a concurrent finding of fact the correctness whereof cannot ordinarily be questioned in a revision petition in the High Court. That is why the only question argued before the High Court, was that of jurisdiction. As we have held that the view accepted by the High Court was wrong, we set aside the order of the High Court and restore that of the Magistrate, First Class, Ludhiana. In the result the appeal is allowed.

Appeal allowed.

K. L. B.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—B.P. SINHA, *Chief Justice*, P.B. GAJENDRAGADKAR, K.N. WANCHOO, K.C. DAS GUPTA AND J.C. SHAH, JJ.

The Bhopal Sugar Industries Ltd., M.P. and another

.. Petitioners*

v.

D.P. Dube, Sales Tax Officer, Bhopal Region, Bhopal and another

.. Respondents.

Madhya Pradesh Sales of Motor Spirit and Lubricants Taxation Act (IV of 1958), section 2 (1)—Definition of 'Retail sale' rendering consumption by the owner of Motor Spirit liable to tax under the Act—If beyond the competence of the State Legislature and void.

Consumption by an owner of goods in which he deals is not a sale within the meaning of the Sale of Goods Act and therefore it is not 'sale of goods' within the meaning of Entry 54, List II, Schedule VII of the Constitution of India (1950). The legislative power for levying tax on sale of goods being restricted to enacting legislation for levy of tax on transactions which conform to the definition of sale of goods within the meaning of Sale of Goods Act, 1930, the extended definition which includes consumption by a retail dealer himself of motor spirit or lubricants sold to him for retail sale is beyond the competence of the State Legislature. But the clause in the definition in section 2 (1) of the Act "and includes the Consumption by a retail dealer himself or on his behalf of motor spirit or lubricant sold to him for retail sale" which is *ultra vires* the state Legislature is severable from the rest of the definition and that clause alone must be declared invalid.

The order of the Sales Tax Officer founded upon this part of the Statute which is *ultra vires* cannot be sustained.

Petition under Article 32 of the Constitution of India for the enforcement of Fundamentals Rights.

S. T. Desai, Senior Advocate, (J.B. Dadachanji, O.C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Petitioners.

B. Sen, Senior Advocate, (K.L. Hathi and I.N. Shroff, Advocates, with him) for Respondents.

The Judgment of the Court was delivered by

Shah, J.—Bhopal Sugar Industries Ltd. (the first petitioner) is a public limited Company incorporated under the Indian Companies Act, 1913, and the second petitioner is a shareholder and a Director of the Company. The Company is a manufacturer of sugar and owns a fleet of motor trucks and other motor vehicles. The Company also carries on the business of selling motor-spirit, high speed diesel oil, and lubricants and maintains a petroleum pump at Sehore in the State of Madhya Pradesh. Between 1st April, 1959 and 31st March, 1960, the Company used, for its motor vehicles 8,908 gallons of petroleum, 40,719 gallons of high speed diesel oil and lubricants of the value of Rs. 2,453.47nP. The first respondent who is the assessing authority under the Madhya Pradesh Sales of Motor Spirit and Lubricants Taxation Act, IV of 1958, assessed the Company to pay sales tax in respect of motor-spirit and lubricants used by the Company out of the stock held by it for its own vehicles, because in his view such consumption amounted to sales within the meaning of the Act.

By this petition under Article 32 of the Constitution it is claimed that the definition of 'retail sale' in section 2 (1) of the Act which seeks to render consumption by the owner of motor-spirit liable to tax under the Act by virtue of section 3 is beyond the competence of the State Legislature and hence void and the order of the first respondent seeking to impose liability upon the Company for payment of tax infringes the fundamental rights of the Company under Article 19 (1) (f) and (g) of the Constitution.

Section 2 (1) of the Madhya Pradesh Sales of Motor Spirit and Lubricants Taxation Act defines a 'retail dealer' as meaning "any person who; on commission or otherwise, sells or keeps for sale motor spirit or lubricant for the purpose of

consumption by the person by whom or on whose behalf it is or may be purchased." Section 2 clause (l) defines 'retail sale' as meaning "a sale by a retail dealer of motor spirit or lubricant to a person for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased and includes the consumption by a retail dealer himself or on his behalf of motor spirit or lubricants sold to him for retail sale;" (The definition is followed by an *Explanation* which is not material for the purpose of this appeal). Section 3 is the charging section. It provides that subject to the provisions of the Act, there shall be levied on all retail sales of motor spirit and lubricants effected after the commencement of the Act, tax at the rates specified in the table set out therein.

The Company is registered under section 4 of the Act as a retail dealer. By section 2 (l) consumption by a retail dealer himself or on his own behalf of motor spirit or lubricants sold to him for retail sale is included in the definition of 'retail sale'. Thereby the Legislature has attempted to enlarge the normal concept of sale, and has included therein consumption for his own purposes by the retail dealer of motor spirit and lubricants sold to him for retail sale, and by section 3 such consumption is made taxable as sale. But this Court held in *The State of Madras v. Gannon Dunkerley & Co., (Madras) Ltd.*,¹ that the expression 'sale of goods' in Entry 48, List II, in Schedule VII of the Government of India Act, 1935 has the same meaning as in the Indian Sale of Goods Act, 1930 and therefore in a transaction of sale of goods which is liable to tax there must be concurrence of the four elements, *viz.* :

- (1) Parties competent to contract ;
- (2) mutual assent ;
- (3) a thing, the absolute or general property in which is transferred from the seller to the buyer ; and
- (4) a price in money paid or promised.

A transaction which does not conform to this traditional concept of sale cannot be regarded as one in respect of which the State Legislature is competent to enact an Act imposing liability for payment of tax. It was observed at page 407 :

"A power to enact a law with respect to tax on sale of goods under Entry 48 must, to be *intra vires*, be one relating in fact to sale of goods, and accordingly, the Provincial Legislature cannot, in the purported exercise of its power to tax sales, tax transactions which are not sales by merely enacting that they shall be deemed to be sales."

In *Gannon Dunkerley & Company's case*¹, this Court was called upon to consider whether in a building contract which is one, entire and indivisible, there is sale of goods. It was held by the Court that the Provincial Legislature was not competent under Entry 48, List II Schedule VII of the Government of India Act, 1935, to impose tax on the supply of materials used in such a contract treating it as a sale. The decision of the Court did not rest upon any peculiar character of a building contract. It was held on the larger ground canvassed in that case, that the expression 'sale of goods' within the meaning of the relevant legislative entry had the same connotation as 'sale of goods' in the Indian Sale of Goods Act, 1930, and therefore the State Legislature had no power to enact legislation to levy tax under Entry 48 of List II in respect of transactions which were not of the nature of sales of goods strictly so called ; and a building contract not being a transaction in which there was a sale of materials by the contractor who constructed the building, the State was not competent to enact legislation to impose tax on the supply of materials used in a building contract treating it as a sale. It was therefore held that the definition of sale in the Madras General Sales Tax Act IX of 1939 was to the extent of the extension invalid.

In *Gannon Dunkerley & Company's case*¹, the validity of section 2 (h) (ii) of the Madras General Sales Tax Act, 1939 as amended by Act XXV of 1947, in so far as it included goods included in a works contract fell to be determined, in the light

1. (1958) S.C.J. 696 : (1958) 2 M.L.J. (S.C.) 65 : (1958) 2 An.W.R. (S.C.) 66 : (1959) S.C. R. 379.

of the competence of the Provincial Legislature under Entry 48, List II in Seventh Schedule of the Government of India Act, 1935. Under the Constitution the relevant entry conferring legislative power upon States to tax sale of goods is Entry 54 of List II. As the scheme of division of legislative power under the Constitution has remained unaltered, the principle of *Gannon Dunkerley's case*¹, applies in adjudging the validity of the provisions of the Madhya Pradesh Act IV of 1958.

Consumption by an owner of goods in which he deals is therefore not a sale within the meaning of the Sale of Goods Act and therefore it is not 'sale of goods' within the meaning of Entry 54, List II, Schedule VII of the Constitution. The legislative power for levying tax on sale of goods being restricted to enacting legislation for levying tax on transactions which conform to the definition of sale of goods within the meaning of the Sale of Goods Act, 1930, the extended definition "which includes consumption by a retail dealer himself of motor spirit or lubricants sold to him for retail sale" is beyond the competence of the State Legislature. But the clause in the definition is section 2 (1) "and includes the consumption by a retail dealer himself or on his behalf of motor spirit or lubricant sold to him for retail sale" which is *ultra vires* the State Legislature because of lack of competence under Entry 54 in List II, Schedule VII of the Constitution is severable, from the rest of the definition, and that clause alone must be declared invalid.

The Sales Tax Officer has sought to impose liability for payment of tax in respect of motor spirit and lubricants consumed by the company for its own vehicles relying solely upon the definition in section 2 (1) of the Act. He has observed:

"The definition under the said section clarifies the retail sale and consumption by a retail dealer. Since the retail sale has been clearly defined and consumption by itself has been included in the retail sale; I do not agree with the contention of dealer's counsel (that the goods consumed for the vehicles of the dealer are not liable to tax under section 3) and taxed on the goods consumed by the dealer as above."

The order of the Sales Tax Officer founded upon a part of the statute which is *ultra vires* cannot be sustained.

Counsel for the State of Madhya Pradesh contends in this petition that the Company is not the owner of the motor spirit and lubricants in which it deals: it is merely a commission agent for sale in respect of the goods supplied to it by the Caltex (India) Ltd., and on that account consumption for his own purpose of goods belonging to his principal amounts to sale within the meaning of the first part of the definition of section 2 (1) of the Act. But the Sales Tax Officer has not decided the case under the first part of the definition of 'retail sale': he has expressly founded his decision on the second part of the definition. In the circumstances we do not feel called upon to express any opinion on the question whether the Company is liable to pay sales tax in respect of goods consumed for its motor-vehicles during the period in question. If it is competent to the Sales Tax Officer to adopt a proceeding to bring to tax consumption of goods by the Company for its own vehicles, relying upon the first part of the definition of 'retail sale' in section 2 (1), because of the terms of the agreement and other relevant surrounding circumstances, it will be open to him to do so.

The petition will therefore be allowed and a writ will issue declaring that the order of assessment made by the first respondent dated 26th December, 1960, in so far as it relates to levy of tax on motor spirit and lubricants consumed during the period of assessment for the vehicles of the Company is invalid. The respondents will pay the costs of this petition to the Company.

K.L.B.

Petition allowed.

1. (1958) S.C.J. 696 : (1958) 2 M.L.J. (S.C.) 66 : (1958) 3 A.W.R. (S.C.) 66 : (1959) S.G.R. 379.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL, AND J. R. MUDHOLKAR, JJ.

Firm Seth Radha Kishan (deceased) represented by Hari Kishan and others .. Appellants*

v.

The Administrator, Municipal Committee, Ludhiana .. Respondent.

Punjab Municipal Act (III of 1911), sections 84 and 86—Scope—Terminal tax levied at a higher rate—Suit for refund is excluded from jurisdiction of civil Court.

The liability to pay terminal tax is created by the Punjab Municipal Act and a remedy is given to a party aggrieved in the enforcement of that liability. An appeal lies against the order of the Municipal Committee levying terminal tax and there is also provision for Reference to the High Court. The party aggrieved can only pursue the remedy provided by the Act and he cannot file a suit in a civil Court in that regard. Provisions of sections 84 and 86 of the Act exclude the jurisdiction of the civil Court in respect of the tax levied or the assessment made under the Act.

Where the Municipal Committee levies the tax at a higher rate under an entry not applicable to the particular commodity if only, it commits a mistake or an error in fixing the rate of tax payable in respect of the particular commodity. Such levy is under the Act and suit for refund of the tax is excluded from the jurisdiction of Civil Courts.

If a levy is on an article not liable to tax it will be outside the Act and civil Court will have jurisdiction.

Appeal from the Judgment and Decree dated the 16th April, 1959, of the Punjab High Court in Regular First Appeal No. 30 of 1952.

S.P. Varma, Advocate, for Appellants.

B.P. Maheshwari, Advocate, for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal raises the question whether a suit would lie in a civil Court claiming refund of the terminal tax collected by a municipality under the provisions of the Punjab Municipal Act, 1911 (Punjab Act III of 1911), hereinafter called the Act.

The appellant is alleged to be a firm registered under the Indian Partnership Act. It carries on business within the limits of the Ludhiana Municipality. It imported *Sambhar* salt into the octroi limits of the Ludhiana Municipality. The Municipal Committee, Ludhiana, imposed terminal tax on the said salt and the appellant paid a sum of Rs. 5,893-7-0 towards the said tax between 24th October, 1947 and 8th December, 1947. Under the Punjab Government Notification No. 26463, dated 21st July, 1932, terminal tax was payable under Item 68 of the Schedule attached to the said Notification at the rate of 3 pies per maund in respect of common salt and under Item 69 at the rate of As. 10 per maund in respect of all kinds other than common salt. The Municipal Committee, Ludhiana, collected terminal tax on the *Sambhar* salt at the higher rate under Item 69 of the Schedule on the ground that it did not fall under Item 68 of the Schedule. The appellant filed a suit against the respondent in the Civil Court, Ludhiana, claiming refund of the said amount with interest. The respondent, *inter alia*, contended that *Sambhar* salt was not common salt and the Civil Court had no jurisdiction to entertain the suit. The Senior Subordinate Judge, Ludhiana, held that *Sambhar* salt was common salt within the meaning of Item 68 of the Schedule, that the imposition of tax on it by the respondent under Item 69 of the Schedule was illegal and that, therefore, the Court had jurisdiction to entertain the suit. On appeal, the High Court of Punjab proceeded on the assumption that *Sambhar* salt was salt common, but held that even so, the Civil Court had no jurisdiction to entertain the suit as the Act provided for a remedy by way of appeal against the wrong orders of the authorities thereunder. It further held that in any view, the suit was premature as the appel-

lant should have pursued his remedies under the Act before coming to the Civil Court. In the result, the decree of the Subordinate Judge was set aside and the suit was dismissed. The present appeal has been preferred by the appellant by way of certificate issued by the High Court.

Mr. Verma, learned Counsel for the appellant, contends that the respondent has no power to impose terminal tax on salt common under Item 69 of the Schedule to the said Notification and therefore the tax having been imposed contrary to the provisions of the Act, the Civil Court has jurisdiction to entertain the suit.

On the other hand, Mr. Maheshwari, learned Counsel for the respondent, argues that the respondent has power to impose terminal tax on common salt under the provisions of the Act, that the imposition of tax under a wrong entry could be rectified only in the manner prescribed by the Act and that the Civil Court has no jurisdiction to entertain a suit for the refund of tax collected when a specific remedy is available under the Act.

It would be convenient at the outset to notice the relevant provisions of the Act. Under section 61 (2) the Municipal Committee has power to impose, with the previous sanction of the State Government, any tax which the State Legislature has power to impose in the State, subject to any general or special orders which the State Government may make in that behalf. The State Government issued the Notification No. 26463 dated 24th July, 1932, to come into force from 1st November, 1932, empowering the Municipal Committee to impose terminal tax at the rates shown in Column 3 of the Schedule attached thereto upon the articles mentioned in Column 2 thereof which are imported into or exported out of the municipal limits by rail or by road. The relevant items are Items 68 and 69. Item 68 is "salt common" and the rate prescribed is 3 pies per maund; and Item 69 is "salt of all kinds other than common salt" and the rate fixed is As. 10-per maund. Section 78 provides for a penalty if any person brings any article liable to the payment of terminal tax into the prescribed limits without paying the said tax. Section 84 gives a right of appeal against any levy or refusal to refund any tax collected under the Act to the Deputy Commissioner or such other officer as may be empowered by the State Government in that behalf; under sub-section (2) thereof, if on hearing of an appeal under the section, any question as to the liability to, or the principle of assessment of a tax arises, on which the officer hearing the appeal entertains reasonable doubt, he may, either of his own motion or on the application of any person interested, state the case and refer the same for the opinion of the High Court; and after the High Court gives its opinion on the question referred to it, the appellate authority shall proceed to dispose of the appeal in conformity with the decision of the High Court. Under section 86, the liability of any person to be taxed cannot be questioned in any manner or by any authority other than that provided in the Act; under sub-section (2) thereof, no refund of any tax shall be claimed by any person otherwise than in accordance with the provisions of the Act and the Rules thereunder. It will be seen from the aforesaid provisions that the power to impose a terminal tax and the liability to pay the same is conferred or imposed on the Municipal Committee and the assessee respectively by the provisions of the Act. The Act also gives a remedy to an aggrieved party to challenge the correctness of the levy or to seek refund of the same. Not only an appeal has been provided for against the order of the Municipal Committee levying the tax or refusing to refund the same, but the appellate authority is empowered to get an authoritative opinion of the High Court on any question as to the liability or on the principle of assessment; and on receiving such opinion, the said authority is bound to dispose of the appeal in the light of the said opinion. It is said that the reference provided to the High Court is in the discretion of the appellate authority and he can with impunity refuse to do so, even if any difficult question is involved in the appeal. The question is not whether a particular officer abuses his power, but whether a remedy is available under the Act or not. It cannot be assumed that an officer, though he entertains reasonable doubt on the question as to liability or on the principle of assess-

ment, he will deliberately and maliciously refuse to do his duty ; if he does, other remedies may be available. The Act also in specific terms debars any authority other than that prescribed under the Act from deciding the question of liability of any person to tax or his right to get refund of a tax paid. In short, the Act contains a self-contained code conferring a right, imposing a liability and prescribing a remedy for an aggrieved party. In such a situation, the question arises whether a Civil Court can entertain a suit for a refund of the tax wrongfully collected from an assessee ; and if so, what are the limits of its jurisdiction ?

We shall now proceed to consider the relevant principles governing the said question. Willes, J., in *Volverhamton New Waterworks Co. v. Hawkesford*¹, describes as follows the three classes of cases in which a liability may be established founded upon a statute ;

“ One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law ; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy the party suing has his election to pursue either that or the statutory remedy. The second class of case is, where the statute gives the right to sue merely, but provides, no particular form of remedy there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.....The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class.

It is clear from the said passage that in a case where the liability is created by a statute, a party aggrieved must pursue the special remedy provided by it and he cannot pursue his remedy in a Civil Court. This principle was approved by the Judicial Committee in *Secretary of State v. Mask and Co.*². The High Courts in India also accepted the principles and applied it to different situations : see *Bhaishankar Nanabhai v. The Municipal Corporation of Bombay*³ ; *Zamindar of Ettayapuram v. San-karappa*⁴. But there is also an equally well settled principle governing the scope of the Civil Court's jurisdiction in a case where a statute created a liability and provided a remedy. Lord Macnaghten in *East Fremantle Corporation v. Annois*⁵, states the principles thus :

“ The law has been settled for last hundred years. If persons in the position of the appellants acting in the execution of a public trust and for the public benefit, do an act which they are authorised by the law to do and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action.....In a word, the only question is, “ Has the power been exceeded ? ” Abuse is only one form of excess.”

In *Gaekwar Sarkar of Baroda v. Gandhi Kachrabhai*⁶, the defendants by the negligent construction of railway made in exercise of their powers under the Railways Act had caused the plaintiff's land to be flooded in the rainy season and consequently damaged. The Railways Act provided that a suit shall not lie to recover compensation for damage caused by the exercise of the powers thereby conferred, but that the amount of such compensation shall be determined in accordance with the Land Acquisition Act, 1890. In spite of this bar the plaintiff brought a suit for damages for injury alleged to have been caused to his field. It was argued that though the statutory authority of the Act of 1890 might have been abused or exceeded the remedy of the aggrieved party was only to proceed under the Land Acquisition Act and not by a civil suit. Rejecting that plea the Judicial Committee observed :

“ It would be simply a waste of time to deal seriously with such contentions as these. It has been determined over and over again that if a person or a body of persons having statutory authority for the construction of works.....exceeds or abuses the powers conferred by the Legislature, the remedy of a person injured in consequence is by action or suit, and not by a proceeding for compensation under the statute which has been so transgressed.”

Indian Courts, in the context of Municipal Acts had occasion to apply both the principles. In *Municipal Board Benares v. Krishna & Co.*⁷, it was held that no suit

1. (1859) 6 C.B. (N.S.) 336, 856.
2. (1940) Mad. 599 : (1940) 2 M.L.J. 140 :
(1940) L.R. 67 I.A. 222.
3. (1907) I.L.R. 31 Bom. 604.
4. (1904) I.L.R. 27 Mad. 483 : 14 M.L.J.

225 (F.B.).
5. L.R. (1902) A.C. 213.
6. (1903) I.L.R. 27 Bom. 344.
7. (1935) I.L.R. 57 All. 1916.

for a refund of an octroi charge, which has been assessed and levied by a Municipality lies in a Civil Court on the ground that the goods were not in fact assessable to octroi duty or that the amount of assessment was excessive. There, the assessment was made in accordance with provisions laid down in the Municipalities Act, and the Rules made thereunder. In *Municipal Committee Montgomery v. Sant Singh*¹, a Full Bench of the Lahore High Court had to consider the question whether a suit would lie in a Civil Court for an injunction restraining a Municipal Committee from realizing the tax demanded from a person on the ground that he was not the owner of the lorries the subject-matter of tax, and consequently the demand made on him was illegal and *ultra vires* of the Municipal Committee. Din Mohammad, J., speaking for the Court, elaborately considered the case-law on the subject and expressed his conclusion in the following words :

"Any special piece of legislation may provide special remedies arising therefrom and may debar a subject from having recourse to any other remedies, but that bar will be confined to matters covered by the legislation and not any extraneous matter. A corporation is the creature of a statute and is as much bound to act according to law as the constituents thereof, namely, the individuals ruled by the corporation and if the corporation does an act in the disregard of its charter and intends to burden any individual with the consequences of its illegal act, an appeal by that individual to the general law of the land can in no circumstances be denied."

This is a case where it may be said that the Municipal Committee acted not under the Act but outside the Act in as much as the tax on vehicles was payable by the owners only but not by those who did not own them. Another Full Bench of the Lahore High Court, in *Administrator Lahore v. Abdul Majid*², had to deal with the jurisdiction of a Civil Court to entertain a suit for an injunction restraining a Municipal Committee from interfering with the construction of the plaintiff's proposed building on the ground that its order refusing sanction under section 193 (2) of the Punjab Municipal Act was an abuse of its power. Mahajan, J., delivering the judgment on behalf of the Full Bench observed at page 84 :

"The provisions of section 225 which make the decision of the Commissioner final can only mean this that that decision is final only so far as the proceedings under the Act are concerned. But when an order is made which is outside that Act, then the provisions of section 225 can have no application to such an order which itself is outside the Act....."

In short the Bench laid down that in two kinds of cases section 225 was no bar to the jurisdiction of a civil Court in examining the order of the Municipal Committee passed under section 193 (2), Punjab Municipal Act. The first case is where a Committee acts *ultra vires* and the second case is where it acts arbitrarily or capriciously. In other words, where it abuses its statutory powers.

The learned Judge concluded thus, at page 85 :

"The remedies given to the subject by a statute are for relief against the exercise of power conferred by a statute but those remedies are not contemplated for usurpation of power under cover of the provisions of the statute. The civil Courts are the proper tribunals in those kinds of cases and their jurisdiction cannot be held barred by reason of statutory remedies provided for grievances arising in the exercise of statutory powers. To cases of this kind the rule that where a statute creates a right and provides at the same time a remedy that remedy and no other is available, has no application."

Further citation is unnecessary. The law on the subject may be briefly stated thus :

Under section 9 of the Code of Civil Procedure the Court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of civil Courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil Courts. The statute may specifically provide for ousting the jurisdiction of civil Courts; even if there was no such specific exclusion, if it creates a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the Civil

1. A.I.R. 1940 Lah. 377, 380. (F.B.)

2. A.I.R. 1945 Lah. 81 (F.B.).

Court's jurisdiction is not completely ousted. A suit in a civil Court will always lie to question the order of a tribunal created by a statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions.

Let us now apply the said principles to the facts of the present case. The liability to pay terminal tax is created by the Act and a remedy is given to a party aggrieved in the enforcement of that liability. As has been already indicated, against the order of the Municipal Committee levying terminal tax an appeal lies to the Deputy Commissioner and a Reference to the High Court. Applying one of the principles stated *supra*, the party aggrieved can only pursue the remedy provided by the Act and he cannot file a suit in a civil Court in that regard. Provisions of sections 84 and 86 of the Act exclude the jurisdiction of the civil Court in respect of the tax levied or the assessment made under the Act.

But the learned counsel for the Appellants contends that the impugned levy was not made under the Act, but in derogation of the provisions thereof. There is no force in this contention. Section 61 (2) of the Act specifically empowers the Municipal Committee to levy any tax other than those specified therein with the previous sanction of the State Government. The levy of terminal tax was sanctioned by the Punjab Government by Notification No. 26463 dated 21st July, 1932, at the rates shown in the column 3 of the Schedule to the said Notification. Under the said Notification, read with section 61 of the Act, the Municipal Committee is empowered to levy terminal tax on salt, whether it is common salt or not. The Committee has, therefore, ample power under the Act and the Notification issued by the State Government to impose the said tax. The only dispute was as regards the rate of tax payable in respect of the salt brought by the appellant into the limits of the Municipal Committee. The rate depended upon the character of the salt. The ascertainment of the said fact is a necessary step for fixing the rate and it is not possible to say that in ascertaining the said fact the authorities concerned travelled outside the provisions of the Act. The learned Counsel contends that if a Municipal Committee levies terminal tax on an article not liable to tax under the Act, a suit would lie and, therefore, the same legal position should apply even to a case where the Municipal Committee levies the tax in respect of an article under an entry not applicable to it. We do not see any analogy between these two illustrations, in the former, the Municipal Committee does not act under the Act, but in the latter it only commits a mistake or an error in fixing the rate of tax payable in respect of a particular commodity; one is outside the Act and the other is under the Act; one raises the question of jurisdiction and the other raises an objection to a matter of detail. We, therefore, hold that in the present case the mistake, if any, committed in imposing the terminal tax can only be corrected in the manner prescribed by the Act. The appellants have misconceived their remedy in filing the suit in the civil Court. The conclusion arrived at by the High Court is correct.

In the result, the appeal fails and is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P.B. GAJENDRAGADKAR, M. HIDAYATULLAH AND J.C. SHAH, JJ.

The State of Uttar Pradesh

*Appellant**

v.

Jogendra Singh

Respondent.

Uttar Pradesh Disciplinary Proceedings (Administrative Tribunal) Rules (1947), rule 4 (2)—Construction—“May”—If means “shall” or “must”

There is no doubt that the word “may” generally does not mean “must” or “shall”. But it is well settled that the word “may” is capable of meaning “must” or “shall” in the light of the context.

It is also clear that when a discretion is conferred on a public authority coupled with an obligation, the word "may" denotes that discretion should be construed to mean a command. Sometimes the Legislature uses the word "may" out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed. It is the context which is decisive.

The whole purpose of rule 4 (2) of the Uttar Pradesh Disciplinary Proceedings (Administrative Tribunal) Rules (1947) would be frustrated if the word "may" in the said rule receives the same construction as in sub-rule (1) as denoting a discretion in the Governor. It is because in regard to Gazetted Government Servants the discretion had already been given to the Governor to refer their cases to the Tribunal that the rule making authority wanted to make a special provision in respect of them as distinguished from other Government Servants falling under rule 4 (1) and rule 4 (2) has been prescribed, otherwise rule 4 (2) would be wholly redundant. The plain and unambiguous object of enacting rule 4 (2) is to provide an option to the Gazetted Government Servants to request the Governor that their cases should be tried by a Tribunal and not otherwise.

Rule 4 (2) imposes an obligation on the Governor to grant a request made by the Gazetted Government Servant that his case should be referred to the Tribunal under the Rules. Where such a request was made and had not been granted proceedings proposed to be taken against the Government Servant otherwise than by referring his case to the Tribunal under the Rules must be quashed.

Appeal from the Judgment and Order dated 10th March, 1960, of the Allahabad High Court (Lucknow Bench) at Lucknow in Special Appeal No. 40 of 1959.

K.S. Hajela, Senior Advocate, (*C.P. Lal*, Advocate, with him), for Appellant.

K. L. Gosain, Senior Advocate, (*Naunit Lal*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The short point of law which arises in this appeal relates to the construction of rule 4 (2) of the Uttar Pradesh Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 (hereinafter called the Rules). That question arises in this way. The respondent Jogendra Singh was appointed a Naib Tehsildar under the appellant, the State of U P. in the year 1937. On 4th August, 1952, he was suspended as complaints had been received against him and an enquiry into the said complaints was contemplated. Accordingly, charges were framed against him and his case was referred for investigation to the Administrative Tribunal appointed under the Rules. The Tribunal held an enquiry and exonerated the respondent from the charges framed against him, in August, 1953.

While the proceedings before the Tribunal were pending, additional complaints were received by the appellant against the respondent's conduct, and they were communicated by the appellant to the Tribunal with an intimation that the appellant proposed to send those further charges against the respondent for enquiry. The Tribunal apparently did not wait for receipt of the said additional charges and concluded its enquiry. That is why on 28th October, 1956, the respondent was again suspended and charges framed on the additional complaints received against him were delivered to him on 29th October, 1956. On 12th November, 1956, the respondent submitted his *Explanation* and pleaded that in case the appellant wanted to pursue the enquiry against him, it might be entrusted to the Administrative Tribunal in accordance with the Rules.

On 28th June, 1958, the Deputy Secretary, Board of Revenue, U.P., informed the respondent that in accordance with the orders passed by the appellant his case had been entrusted to the Commissioner, Gorakhpur Division with directions to take disciplinary proceedings against him, and his request that the charges against him should be entrusted for investigation to the Administrative Tribunal had been rejected.

Thereupon, the respondent filed a Writ Petition in the High Court of Judicature at Allahabad on 14th July, 1958, and prayed that a writ, or a direction or an appropriate order should be passed against the appellant quashing the proceedings intended to be taken against him before the enquiring officer appointed by the appellant under rule 55 of the Civil Services (Classification, Control and Appeal) Rules. The learned single Judge who heard the Writ Petition held that the respondent being a gazetted officer, the appellant was bound to grant his request that the enquiry against him should be held by the Administrative Tribunal appointed under the Rules. That is why the Writ Petition was allowed and the

order directing the enquiry to be held by the appointed authority under rule 55 of the said Civil Services Rules was quashed.

This order was challenged by the appellant by an appeal under the Letters Patent before a Division Bench of the said High Court. The Division Bench agreed with the view taken by the learned single Judge and dismissed the appeal. The appellant then applied for and obtained a certificate from the said High Court and it is with the said certificate that it has come to this Court.

Mr. Hajela for the appellant contends that the conclusion reached by the Courts below is not supported on a fair and reasonable construction of rule 4 (2) of the Rules. The appellant's case is that in the State of U.P. it is competent to the Governor to direct that disciplinary proceedings against the officers specified in rule 4 of the Rules should be tried before an Administrative officer, but there is no obligation on the Governor in that behalf. The Governor may, if he so decides direct that the said enquiry may be held under rule 55 of the Civil Services Rules and conducted by an appropriate authority appointed in that behalf. Whether the enquiry should be held by the Administrative Tribunal, or by an appropriate authority, is a matter entirely within the discretion of the Governor.

On the other hand, the High Court has held that so far as cases of gazetted government servants are concerned, they are covered by rule 4 (2) of the Rules and on a fair construction of the said rule, it is clear that if a gazetted government servant requests that the enquiry against him should be held by the Administrative Tribunal, the Governor is bound to grant his request. So, the narrow point which arises for our decision is which of the two views can be said to represent correctly the effect of rule 4 (2) of the Rules. Rule 4 reads as follows :

"4. (1) The Governor may refer to the Tribunal cases relating to an individual government servant or class of government servants in a particular area only in respect of matters involving—

(a) corruption ;

(b) failure to discharge duties properly ;

(c) irremediable general inefficiency in a public servant of more than ten years' standing ;

and

(d) personal immorality.

(2) The Governor may, in respect of a gazetted government servant on his own request, refer his case to the Tribunal in respect of matters referred to in sub-rule (1)."

It would be noticed that rule 4 (1) confers discretion on the Governor to refer to the Tribunal cases falling under clauses (a) to (d) in respect of servants specified by the first part of sub-rule (1). In regard to these cases, the government servant concerned cannot claim that the enquiry against him should not be held by a Tribunal and the matter falls to be decided solely in the discretion of the Governor. It is also clear that amongst the classes of servants to whom sub-rule (1) applies, gazetted government servants are included, so that if rule 4 (1) had stood by itself even gazetted government servants would have no right to claim that the enquiry against them should not be held by a Tribunal. It is in the light of this provision that rule 4 (2) has to be considered.

Rule 4 (2) deals with the class of gazetted government servants and gives them the right to make a request to the Governor that their cases should be referred to the Tribunal in respect of matters specified in clauses (a) to (d) of sub-rule (1). The question for our decision is whether like the word "may" in rule 4 (1) which confers the discretion on the Governor, the word "may" in sub-rule (2) confers the discretion on him, or does the word "may" in sub-rule (2) really mean "shall" or "must"? There is no doubt that the word "may" generally does not mean "must" or "shall". But it is well-settled that the word "may" is capable of meaning "must" or "shall" in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes that discretion should be construed to mean a command. Sometimes, the Legislature uses the word "may" out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed. In the present case, it is the context which is decisive. The whole

purpose of rule 4 (2) would be frustrated if the word "may" in the said rule receives the same construction as in sub-rule (1). It is because in regard to gazetted government servants the discretion had already been given to the Governor to refer their cases to the Tribunal that the rule-making authority wanted to make a special provision in respect of them as distinguished from other government servants falling under rule 4 (1) and rule 4 (2) has been prescribed, otherwise rule 4 (2) would be wholly redundant. In other words, the plain and unambiguous object of enacting rule 4 (2) is to provide an option to the gazetted government servants to request the Governor that their cases should be tried by a Tribunal and not otherwise. The rule-making authority presumably thought that having regard to the status of the gazetted government servants, it would be legitimate to give such an option to them. Therefore, we feel no difficulty in accepting the view taken by the High Court that rule 4 (2) imposes an obligation on the Governor to grant a request made by the gazetted government servant that his case should be referred to the Tribunal under the Rules. Such a request was admittedly made by the respondent and has not been granted. Therefore, we are satisfied that the High Court was right in quashing the proceedings proposed to be taken by the appellant against the respondent otherwise than by referring his case to the Tribunal under the Rules.

The appeal accordingly fails and is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

The State of Andhra Pradesh and others

.. *Appellants**

v.

S. Sree Rama Rao

.. *Respondent.*

Constitution of India (1950), Article 226—Petition for quashing proceedings of departmental authorities' enquiry against and removal from service of a public servant—Finding of fact by departmental authorities—Jurisdiction of High Court to interfere with.

The departmental authorities (holding an enquiry against and removing from service a public servant) are, if the enquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution. There is no warrant for the view that in considering whether a public officer is guilty of the misconduct charged against him, the rule followed in criminal trials that an offence is not established unless proved by evidence beyond reasonable doubt to the satisfaction of the Court, must be applied, and if that rule be not applied, the High Court in a petition under Article 226 of the Constitution is competent to declare the order of the authorities holding a departmental enquiry invalid. The High Court had no jurisdiction to set aside the order of removal from service either on the ground that the "approach to the evidence was not consistent with the approach in a criminal case" nor on the ground that the High Court would have on that evidence come to a different conclusion.

Appeal by Special Leave from the Judgment and Order dated 18th November, 1959, of the Andhra Pradesh High Court in Writ Petition No. 922 of 1956.

T. V. R. Tatachari and P. D. Menon, Advocates, for Appellants.

K. Bhimasankaram, Senior Advocate (T. Salyanarayana, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—On 10th March, 1955, the Deputy Inspector-General of Police, State of Andhra passed an order dismissing the respondent (who was a Sub-Inspector of Police appointed on probation) from service. On appeal to the Inspector-General of Police, the order was altered into one of removal from service. The respondent then moved the High Court of Andhra Pradesh by a petition under Article 226 of the Constitution for a writ of *certiorari* or other appropriate writ or direction

quashing the proceedings of the Inspector-General of Police including his order dated 24th September, 1955, and the order of the Deputy Inspector-General of Police dated 10th March, 1955, and for such other orders as the Court may deem fit. The High Court quashed the two impugned orders. Against the order passed by the High Court, this appeal is preferred with a Special Leave.

It is necessary to set out in some detail the facts which gave rise to the departmental proceedings against the respondent resulting in his removal from service. The respondent was at the material time in charge of the Police Station, Kodur, Visakhapatnam District. On 18th February, 1954, an offence of house breaking and theft was reported at the Police Station and was registered on 19th February, 1954. It was recited in the report of the Village Munsif of Vechalam that one Durgalu who was then absconding was suspected to be the offender. This Durgalu was apprehended by the Village Munsif of Kaligotla on 5th March, 1954 and was handed over to the Village Munsif of Vechalam, who in his turn sent Durgalu to Kodamanchali Simhachalam and Koduru Sumudram. It is the case of the State that Durgalu was handed over to the respondent on the night of 5th March, 1954, but no written acknowledgment in token of having received Durgalu from the village servants was given by the respondent, nor was any entry posted in the Station Diary, and Durgalu was thereafter confined in the Police Station from the night of 5th March, 1954, without any order from a Magistrate remanding him to police custody. On 7th March, 1954, the respondent entrusted charge of the Police Station to a Head Constable and left for Kakinada on casual leave for 5 days. He returned to Kodur on 12th March, 1954. After the departure of the respondent, some Constables arrested one Reddy Simhachalam and brought him to the Police Station in the evening of 7th March, 1954. It is the case of the State that as a result of torture by Police Constables Nos. 1199, 363 and 662, Reddy Simhachalam became unconscious. The dead body of Reddy Simhachalam was found floating in a well near the Police Station on the morning of 9th March, 1954, and an enquiry into the circumstances in which the death took place was commenced by the Revenue Divisional Officer, Narsipatnam. In the enquiry, Durgalu made a statement that he had witnessed the torture of Reddy Simhachalam, in the Police Station, by the three Constables. Police Constables Nos. 1199, 363 and 662 were then charged before the Sub-Magistrate, Chodavaram, for offences under sections 304 (2) and 201 read with section 114, Indian Penal Code, for causing the death of Reddy Simhachalam by torturing him and for causing disappearance of the evidence of his death. Before the Sub-Magistrate, Durgalu retracted his earlier statement and stated that the statement that he was an eye-witness to the torture of Reddy Simhachalam was untrue, and that he was induced to make that statement by the police. He deposed that he had escaped from the custody of the village servants before he reached the Police Station Kodur on 5th March, 1954, and that he was re-arrested on 8th March, 1954. The Sub-Magistrate discharged the Police Constables holding that once Durgalu the only eye-witness turned hostile, there was no direct evidence on which even a *prima facie* case could be made out against them. The record of the case before the Sub-Magistrate was called by the Sessions Judge, Visakhapatnam, *suo motu*. The Sessions Judge held it proved on the evidence that Durgalu was arrested on 5th March, 1954, and was taken to the Police Station, Kodur and was wrongfully confined since that date in the Police Station, and the story of Durgalu before the Sub-Magistrate that after he was arrested on 5th March, 1954, and was taken to the Kodur village on that very day he had escaped from custody and that he remained in his village Vechalam could not be believed.

A departmental enquiry was commenced in May, 1954 against the respondent. The charge in the disciplinary proceedings against the respondent after it was amended ran as follows :—

"Reprehensible conduct in wrongfully confining a K.D., Chandana Durgalu accused in Cr. No. 17/54 of Kodur Police Station from the night of 5th March, 1954 to 7th March, 1954 in the Police Station when he went on five days casual leave."

To the charge was appended a "statement of facts" reciting, *inter alia*, that Durgalu was apprehended by the Village Munsif, Kaligotla and was handed over to the Village Munsif, Vechalam, that Durgalu was sent by the latter with the written report with the assistance of village servants, that on the same night the latter handed over Durgalu to the respondent in the Police Station, Kodur at about 12 midnight, with the report of the Village Munsif and demanded acknowledgment but the acknowledgment was refused by the respondent, and that the respondent did not mention these facts in any of the station records and wrongfully confined Durgalu in the Police Station till 7th March, 1954, when he proceeded on casual leave for five days. This, the "statement of facts" added, constituted grave and reprehensible conduct and hence the charge. The respondent submitted an explanation in which he submitted that Durgalu was not handed over to him on 5th March, 1954, as alleged nor at any time before he proceeded on 7th March, 1954, on casual leave. His plea was that when he proceeded on leave he entrusted charge of the Police Station to the Head Constable leaving instructions to trace Durgalu and to take action.

The Deputy Superintendent of Police held the departmental enquiry and submitted his report on 27th October, 1954, setting out the evidence of the witnesses examined on behalf of the State and the respondent, and summing up the conclusion by reciting that the evidence in the case for the State made out a strong case against the respondent, that it was established that Durgalu was arrested on 5th March, 1954, and was sent by the Village Munsif to Vechalam who in his turn sent him with the village servants to the Police Station, Kodur, and Durgalu was handed over to the respondent on the night of 5th March, 1954, that the story of Durgalu that after he was arrested on 5th March, 1954, he escaped from the custody of the village servants and was again arrested on 8th March, 1954, was false. The report then concluded :

"All these facts go to show that he was arrested on the 5th without a shadow of doubt, but if the judgment of the learned Court which is based on the retracted statement of Durgalu is considered the 'sacred truth' the delinquent may have benefit of doubt."

This report was considered by the authority competent to impose punishment and a provisional conclusion that the respondent merited punishment of dismissal for the charges held established by the report was recorded. A copy of the report of the Enquiry Officer was sent to the respondent and he was called upon to submit his representation against the action proposed to be taken in regard to him. The respondent submitted his representation which was considered by the Deputy Inspector-General of Police, Northern Range, Waltair. That Officer referred to the evidence of witnesses for the State about the arrest of Durgalu on 5th March, 1954 and the handing over of Durgalu to the respondent on the same day. He observed that the evidence of Durgalu that after he was arrested on 5th March, 1954, he had made good his escape and was again arrested on 8th March, 1954, could not be accepted. Holding that the charge against the respondent was serious and had on the evidence been adequately proved, in his view the only punishment which the respondent deserved was of dismissal from the police force.

In appeal the Inspector-General of Police accepted the evidence of the witnesses who had deposed that they had handed over Durgalu to the respondent on 5th March, 1954. In his view the respondent had

"betrayed gross dishonesty and lack of character in falsifying the records by omitting to write what he had done and what happened in the Police Station, thereby proving himself thoroughly dishonest and untrustworthy", and "showing himself unfit to hold the responsible post of a Sub-Inspector of Police", and that "his records as a Probationary Sub-Inspector of Police are generally unsatisfactory and he has earned a reputation for inefficiency and lack of interest in work for weakness in dealing with his subordinates, which are all attributes that militate against his becoming useful Sub-Inspector of Police."

But taking into consideration his young age and inexperience, the Inspector-General of Police reduced the order of dismissal into one for removal from service.

In the departmental proceeding a simple question of fact fell to be determined—viz., whether Durgalu was arrested on 5th March, 1954, and was delivered over by the village servants to the respondent at Police Station, Kodur on the night of 5th March, 1954. There is no dispute that Durgalu was arrested on 5th March, 1954, and was sent by the Village Munsif, Vechalam with his report to the Police Station, Kodur. The only question in dispute was whether Durgalu was handed over to the respondent on 5th March, 1954 as stated by the witnesses for the State. The case of the State was accepted by the Deputy Inspector-General of Police who passed the order of dismissal and the Inspector-General of Police in appeal. But the High Court declined to accept this view of the evidence. In so doing, with respect it must be observed, the High Court assumed to itself jurisdiction which it did not possess. The High Court was of the view that the conclusion of the departmental authorities was vitiated, because the Enquiry Officer dealt with the evidence of witnesses for the State, and the witnesses for the respondent separately, and the Deputy Inspector-General of Police and Inspector-General of Police did not in recording their orders refer to all the evidence led before the Enquiry Officer and they

“failed to appreciate the full significance of the rule concerning the onus of proving. The rule meant that everything essential to the establishment of a charge lies on the person, who seeks to establish the charge. It further means that the two sets of evidence in the case must not be examined separately in order to ascertain first whether those for establishing the charge have proved it and then to examine the defence in order to see how far the conclusions are unjustified. The better approach, which has been described as the golden thread in the web of criminal law is to examine the law, the whole evidence in order to ascertain how far the liability of the person proceeded against has been established beyond reasonable doubt.”

The High Court then observed that ordinarily the conclusions on questions of fact by a body or tribunal in a proceeding under Article 226 of the Constitution are accepted by the High Court but that general rule does not apply “whenever an important principle of jurisprudence is discarded in reaching such findings”, and since the fundamental rule that a person should be punished only after the entire evidence in the case had been considered and he is found liable beyond reasonable doubt, had not been followed, the conclusions of the departmental authorities were vitiated. The High Court again observed that the orders passed by the departmental authorities were vitiated because of two other matters : (i) that the Enquiry Officer declined to summon and examine two witnesses for the defence even though a request in that behalf was made ; and (ii) that there was no charge against the respondent of “falsifying the record by omitting to write what he had done or what happened in the Police Station”, and he had not been given an opportunity of meeting such a charge and therefore the respondent had no fair hearing consistent with the principles of natural justice.

There is no warrant for the view expressed by the High Court that in considering whether a public officer is guilty of the misconduct charged against him, the rule followed in criminal trials that an offence is not established unless proved by evidence beyond reasonable doubt to the satisfaction of the Court, must be applied, and if that rule be not applied, the High Court in a petition under Article 226 of the Constitution is competent to declare the order of the authorities holding a departmental enquiry invalid. The High Court is not constituted in a proceeding under Article 226 of the Constitution a Court of appeal over the decision of the authorities holding a departmental enquiry against a public servant : it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence. Which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. The High Court may undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules

of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution.

The Enquiry Officer had accepted the evidence of witnesses for the State that Durgalu was handed over to the respondent on 5th March, 1954, and the observation that the respondent may have the benefit of doubt if the judgment of the Magistrate is considered "sacred truth" appears to have been made in a somewhat sarcastic vein, and does not cast any doubt upon the conclusion recorded by him. The Enquiry Officer appears to have stated that the judgment of the Magistrate holding a criminal trial against a public servant could not always be regarded as binding in a departmental enquiry against that public servant. In so stating the Enquiry Officer did not commit any error. The first ground on which the High Court interfered with the order of the punishing authorities is therefore wholly unsustainable.

The two other grounds on which the High Court also based its conclusion—namely, refusal to summon and examine witnesses for the respondent and holding the respondent guilty of a charge of which he had no notice are equally without substance. It appears that the respondent desired to examine Police Constables Nos. 178, 506 and 569 to prove that Durgalu was not in the lock-up till 8th March, 1954. Police Constable No. 506 was examined as a witness for the respondent, and the Enquiry Officer has not accepted his evidence. The other two witnesses were neither summoned nor examined, but it appears from the record that on 20th September, 1954, the respondent promised to produce the witnesses whom he had cited in his defence. At the hearing dated 26th September, 1954, three witnesses were examined by the respondent and the respondent was given another opportunity to secure the presence of the remaining defence witnesses. On 27th September, 1954, Police Constable 506 was examined and it appears that the respondent expressed his desire not to examine any more witnesses. In the proceeding of the Enquiry Officer there is a note that "your defence witnesses have been examined and such documents you required have been produced and exhibited". The respondent subscribed his signature in acknowledgment of the correctness of that recital. He did not raise any objection in the representation made by him before the Deputy Inspector-General of Police when notice was issued on him to show cause why he should not be punished. In the memo. of appeal to the Inspector-General of Police, it was submitted by the respondent that the Police witnesses were to be summoned by the Enquiry Officer, and that he did not summon them. It was also submitted that the statement signed by the respondent was only in respect of private witnesses, and not Police witnesses. But the endorsement made by the Enquiry Officer is not susceptible of any such interpretation, which refers to all witnesses for the respondent. The record does not show that an application for summoning the Police witnesses was made and the Enquiry Officer in breach of the Rules declined to summon them. We are in the light of this evidence of the view that the respondent did not, after the examination of Police Constable No. 506, desire to examine the two Police Constables Nos. 178 and 569, whom he originally wanted to examine.

It was next urged that the findings recorded were not in respect of the charge which the respondent was called upon to answer. The charge against the respondent was that he had wrongfully confined Durgalu on 5th March, 1954 to 7th March, 1954, in the Police Station. In the statement of facts which accompanied

the charge-sheet it was stated in express terms that the respondent had not recorded in any of the Diaries of the Police Station that Durgalu was handed over to him on 5th March, 1954. The charge and the "statement of facts" form part of a single document on the basis of which proceedings were started against the respondent and it would be hyper-critical to proceed on the view that though the respondent was expressly told in the statement of facts which formed part of the charge-sheet, that he had failed to record that Durgalu was handed over to him, that ground of 'reprehensible conduct' was not included in the charge, and on that account the enquiry was vitiated. No objection appears to have been raised before the Deputy Inspector-General or even the Inspector-General of Police, that there was infirmity in the charge on that account, and that infirmity had prejudiced the respondent in the enquiry. The respondent had full notice of the charge against him, and he examined witnesses in support of his defence and made several argumentative representations before the Deputy Inspector-General, the Inspector-General of Police and the Government of Andhra Pradesh.

In our judgment the proceedings before the departmental authorities were regular and were not vitiated on account of any breach of the rules of natural justice. The conclusions of the departmental officers were fully borne out by the evidence before them and the High Court had no jurisdiction to set aside the order either on the ground that the "approach to the evidence was not consistent with the approach in a criminal case," nor on the ground that the High Court would have on that evidence come to a different conclusion. The respondent had also ample opportunity of examining his witnesses after he was informed of the charge against him. The conclusion recorded by the punishing authority was therefore not open to be canvassed, nor was the liability of the respondent to be punished by removal from service open to question before the High Court.

The appeal is allowed and the order passed by the High Court is set aside. The petition filed by the respondent is dismissed. There will be no order as to costs. The order as to costs passed by the High Court will stand.

Appeal allowed.

K.S.

THE SUPREME COURT OF INDIA. (Criminal Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.
.. *Appellant**

Ajendranath

.. *Respondent.*

v.

The State of Madhya Pradesh

Penal Code (XLV of 1860), section 414—Gist of offence—Conviction if permissible only if another person is traced out and convicted of offence of committing theft.

Section 414 of the Indian Penal Code makes it an offence for a person to assist voluntarily in stealing or disposing of or making away with property which he knows or has reason to believe to be stolen property. It is not necessary for a person to be convicted under section 414 that another person must be traced out and convicted of an offence of committing theft. The prosecution has simply to establish that the property recovered is stolen property and the accused person provided help in its concealment and disposal.

Appeal by Special Leave from the Judgment and Order dated 28th June, 1960, of the Madhya Pradesh High Court in Criminal Appeal No. 385 of 1959.

A. R. Choubay and Naunit Lal, Advocates, for Appellant.

I. N. Shroff, Advocate. for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This appeal, by Special Leave, is directed against the order of the High Court of Madhya Pradesh reversing, on State appeal, the order

23rd April, 1963.

of the Additional Sessions Judge, Hoshangabad, acquitting the appellant, and convicting him of an offence under section 414 Indian Penal Code.

Five bales, containing woollen shawls and mufflers despatched from Kanpur by the British India Corporation Ltd., Kanpur Woollen Mills Branch, Kanpur, and another bale despatched from Haimanpur to Kanpur, were loaded at Itarsi Railway Station on 18th September, 1957, in Wagon No. C.R. 325. The lock of the wagon was found broken open at Pandhurna Railway Station at about 10 A.M. on 20th September 1957. On checking at Nagpur the aforesaid bales were found missing. One of the bales despatched from Kanpur was found lying the next morning near the railway line between Railway Stations Jaulkheda and Multai.

On 23rd September, 1957, the house of one Gopi Nath, at Multai, was searched and certain articles, including some torn labels were recovered from that house.

The same day, the police found the appellant and a few other persons come out of Gopi Nath's house at Betul, whose front door was locked. Subsequently, these persons were taken to the Police Station, where the appellant made a statement showing readiness to point out the stolen property. At his instance, the police recovered from different places of that house, woollen shawls, mufflers, bed-sheets and certain house-breaking implements. These recoveries were made on 23rd and 24th September.

As a result of investigation, six persons were put on trial in the Magistrate's Court. Ajendranath, appellant, was charged under sections 120-B, 379 and 414, Indian Penal Code. Babu Ram was charged under sections 120-B and 379 Indian Penal Code. Ram Prasad and Gyarsi were charged under section 120-B read with section 379 Indian Penal Code. Gopinath under section 120-B read with section 414 Indian Penal Code; and Birendranath under section 414 Indian Penal Code. The learned Magistrate acquitted Birendranath and convicted the other accused of the offence under section 120-B read with section 379 Indian Penal Code, except in the case of Gopinath, who was convicted of the offence under section 120-B read with section 414 Indian Penal Code. Ajendranath was also convicted of the offence under section 414 Indian Penal Code.

On appeal, the learned Additional Sessions Judge, Hoshangabad, acquitted all these convicted persons. He held that the property recovered was not proved to be stolen property and that the alleged conspiracy was not proved. The State filed an appeal against the acquittal of Gopinath and Ajendranath. The High Court dismissed the appeal against Gopinath and the appeal against Ajendranath for the offence of conspiracy. It however allowed the appeal against Ajendranath with respect to the offence under section 414 Indian Penal Code. It is against this order that this appeal has been filed by Ajendranath, appellant.

Ajendranath did not question the recovery of the various articles from Gopinath's house at Betul at his instance. He did not claim the property to be his own, but stated that it was not stolen property. The main contention for the appellant in this Court has been that these recovered articles were not proved to be stolen property. The articles consisted of those said to have been sent by the British India Corporation Ltd., Kanpur Woollen Mills Branch Kanpur, and bed-sheets sent by the firm of V.S.N.C. Narsingha Chettiar, which carries on business of wholesale Hand Loom Cloth at Karur.

The invoices relating to the four bales sent by the Kanpur Woollen Mills give the details of the shawls and mufflers the bales contained. A very large quantity of these has been recovered. Out of 95 shawls and 60 mufflers, as many as 80 shawls and 43 mufflers had been recovered. Similarly, out of 10 pairs of bed-sheets stolen, 8 pairs have been recovered. The absence of any adequate explanation for the presence of such a large quantity of articles similar to those proved to have been despatched by the Kanpur Woollen Mills or by the Karur company, the recovery of these articles within a few days of the theft, the presence of silk and paper labels of Kanpur Woollen Mills on most of the shawls and mufflers recovered and of certain manuscript writing on the labels of the bed sheets by P.W. 24, Krishna-

murthi, brother of P.W. 16, Venkatraman, who does the Karur business, have been taken into consideration by the High Court for coming to the finding that the property recovered was proved to be stolen property. These circumstances cannot be said to be such which would not justify the finding arrived at.

The main contention for the appellant however is that it has not been definitely established from the evidence of Kunzru, P.W. 10 that the shawls, and mufflers recovered were manufactured by the Kanpur Woollen Mills and were despatched in the bales which were subsequently stolen. Kunzru's evidence does fall short of establishing that the shawls and mufflers recovered were manufactured by the Kanpur Woollen Mills. He has not identified the recovered shawls and mufflers as those manufactured by these mills. In fact, he was not even shown all the shawls and mufflers recovered. He was shown by the Police Inspector, Government Railway Police, two loes (two shawls) and two mufflers. He got them examined by the textile expert, and, on the report of the expert, gave the certificate that they appeared to be manufactured by the Woollen Mills of Kanpur. That expert has not been examined in Court and therefore Kunzru's statement alone fails to establish that these shawls and mufflers were manufactured by these mills. However, it is not open to doubt that they were manufactured by these mills when most of them had sewn silk labels of these mills and quite a good number of them had even paper labels indicating that they were manufactured by these mills. There is no reason to suppose and in fact no such suggestion has been made that these labels had been put on these articles by some one for the purpose of deception. We therefore consider that the finding that these shawls and mufflers were the manufacture of Kanpur Woollen Mills is correct.

It was also contended for the appellant that it was not proved that these shawls and mufflers were in the bales which were despatched by the Kanpur Woollen Mills and that the gate passes and the invoices produced by Kunzru were not proved as persons who wrote them had not been examined. Kunzru produced the originals of these documents. He is the salesman of the Kanpur Woollen Mills. His cross-examination in no way indicates that his statement about the genuineness of the invoices and gate passes was questioned in cross-examination. There is nothing to suppose that the invoices and gate passes produced in Court did not correctly represent the articles placed inside particular bales to which specific numbers were given and that those bales were despatched from the Mills in accordance with the gate passes. In this connection reference was made to the fact that five of the shawls recovered were of violet colour and no shawls of such a colour was mentioned in any of the invoices. There can be a possibility of a mis-description in the invoices. There can be a possibility of the violet shawls being the property stolen in some other incident. The fact remains that even the violet shawls are not claimed by the appellant as his own. So, we do not consider there is any force in this contention for considering the finding of the High Court defective about the property recovered to be stolen property.

With respect to the identity of the bed-sheets, there is the evidence of P.Ws 16 and 24. P.W. 16 deposed that he had supplied 10 pairs of bed-sheets to a certain customer who disowned the bale. Thereupon he asked the Station Master, Ahimanpur to return the parcel to Karur. He recognized the various sheets to be of his firm which they had despatched to Ahimanpur. He further deposed that before despatching the goods they paste the firm labels on them. He stated that his younger brother Krishnamurti had noted size-number and pattern over these sheets in his hand-writing, as he happened to be at home on vacation. Krishnamurti, P.W. 24, admits that certain labels on the bed-sheets, were in his hand-writing, that he wrote them under instructions of his brother and that he had not written similar numbers on any other bed-sheets. He however stated subsequently that he did such type of markings casually, on occasions, and that the Sub-Inspector had also got him write the size, pattern etc., on certain other blank labels of the shop as well.

The learned Additional Sessions Judge did not rely on these statements and felt that the Investigating Officer might have got those markings on the labels of the recovered articles during the investigation. The High Court thought that there was no reason for doubting the correctness of the statements of these witnesses and for suspecting that the writings on the labels were obtained during the investigation. No question was put to P.W. 24 about the police making him write on the labels on the recovered articles. In fact, according to the witness, labels with his writings were shown to him for purposes of recognition and he recognized these writings to be his. The police took his writings on blank labels for purposes of comparison. We therefore see no good reason for considering the finding of the High Court with respect to the bed-sheets recovered to be stolen property to be wrong.

It was also contended that it was not open to the High Court to record a finding about the recovered property to be stolen property when the Government had not appealed against the other co-accused who were acquitted on the basis of the finding that the property recovered was not proved to be stolen property. We do not see any force in this contention. The mere fact that the learned Additional Sessions Judge acquitted the other accused on the ground that property recovered was not proved to be stolen property did not preclude the State from appealing against the acquittal of the appellant against whom there is better evidence for establishing that he was in possession of the stolen property than the evidence was against the other co-accused. The State could challenge the correctness of the findings of the learned Additional Sessions Judge about the property being stolen property and, consequently, the High Court can record its own finding on that question.

Lastly, it was also urged that even if the identity of the articles recovered with the articles stolen be established, no offence under section 414 Indian Penal Code is made out against the appellant as the other accused have been acquitted and it is not known whom the appellant is supposed to have helped in concealing the stolen property. Section 414 Indian Penal Code makes it an offence for a person to assist voluntarily in stealing or disposing of or making away with property which he knows or has reason to believe to be stolen property. It is not necessary for a person to be convicted under section 414 Indian Penal Code that another person must be traced out and convicted of an offence of committing theft. The prosecution has simply to establish that the property recovered is stolen property and that the appellant provided help in its concealment and disposal. The circumstances of the recovery sufficiently make out that the property was deliberately divided into different packets and was separately kept. May be that the property falling to the share of a particular thief was kept separately. It was recovered from several different places in the same house. These places included an iron safe and an underground cellar. The evening before, several persons, including the appellant, were found to be coming out of the back door of the house which had its front door locked. The appellant also knew the whereabouts of the property inside the house of his maternal grandfather. He attempted to sell a few mufflers a day before the recoveries were made. He was seen arriving at the house, during the night, in a car with some persons and then removing property which looked like bales from the car to the house. All these circumstances go to support the finding that he had assisted in the concealment of the stolen property and had thus committed the offence under section 414 Indian Penal Code.

We therefore see no force in this appeal and, accordingly, dismiss it.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—B.P. SINHA *Chief Justice*, J.C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Kirpal Singh

.. Appellant*

v.

The State of Uttar Pradesh

.. Respondent.

*Criminal Procedure Code (V of 1898), section 207-A—Duty of Committing Magistrate to record the evidence of all the witnesses—Limits.**Criminal Trial—Evidence—Identification of accused from his "voice and gait"—Probative value.*

Under the Code of Criminal Procedure as amended by Act XXVI of 1955, the Magistrate holding committal proceedings is required to take evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged, and if the Magistrate is of opinion that it is necessary in the interest of justice to take the evidence of any one or more of the other witnesses for the prosecution he may take such evidence also. The Magistrate has in the inquiries relating to charges for serious offences like murder the power and indeed a duty in the interest of the accused as well as in the larger interest of the public to record the evidence of other witnesses who throw light on the case. The Legislature has by enacting section 207-A conferred a discretion upon the Magistrate in the matter of examination of witnesses not produced by the prosecutor. Exercise of that discretion must be judicial; it is not to be governed by any set rules or standards, but must be adjusted in the light of the circumstances of the case. The Magistrate is again not to be guided by the attitude of the prosecutor. A Magistrate failing to examine witnesses to the actual commission of the offence because they are not produced, without considering whether it is necessary in the interest of justice to examine such witnesses fails in the discharge of his duties.

It is true that the evidence about identification of a person by the timbre of his voice depending upon subtle variations in the overtones when the person recognising is not familiar with the person recognised may be somewhat risky in a criminal trial. But when the person identified as the assailant was intimately known to the witness who had been frequently meeting that person recently in connection with the disputes with the victim; it cannot be said that the identification was so improvable that the Supreme Court in appeal by Special Leave would be justified in disagreeing with the opinion of the Court which saw the witness and formed the opinion as to credibility and of the High Court which considered the evidence and accepted the testimony.

Appeal by Special Leave from the Judgment and Order dated 13th September, 1962 of the Allahabad High Court in Criminal Appeal No. 877 of 1962 and Referred No. 79 of 1952.

O.P. Rana, Advocate, for Appellant.

G.C. Mathur and G.P. Lal, Advocates, for Respondent.

The judgment of the Court was delivered by

Shah, J.—The appellant Kirpal Singh and his two brothers Arjun Singh and Sarwan Singh, were tried by the Sessions Judge, Pilibhit for causing the death of one Karam Singh with gunshot injuries in the evening of 26th March, 1961 at Village Shanti Nagar. The Sessions Judge acquitted Arjun Singh and Sarwan Singh and convicted the appellant Kirpal Singh of the offence charged against him and sentenced him to suffer the penalty of death subject to confirmation by the High Court. The High Court of Allahabad confirmed the order of conviction and sentence. With Special Leave, Kirpal Singh has appealed to this Court.

The case for the prosecution was as follows :

The appellant and his father-in-law Rakkha Singh were refugees from West Pakistan. A block of agricultural land, allotted by the Government to Rakkha Singh and the appellant was partitioned but no boundary marks were erected on the line dividing the lands. In December, 1960 there was a dispute between Rakkha Singh on the one hand and the appellant and his brothers on the other about the harvesting of sugarcane planted in the land. This dispute was settled on the intervention of one Sardar Ajit Singh, and Rakkha Singh agreed to give seven hundred maunds of sugarcane to the appellant and his brothers. The appellant and his brothers went to the house of Rakkha Singh on 22nd March, 1961 and complained that they were not given four hundred maunds of sugarcane out of the seven hundred maunds promised to them. There was a quarrel on that occasion between Karam Singh eldest son of Rakkha Singh and the appellant, the former saying that the appellant and his brothers 'were behaving like dishonest persons.' Rakkha Singh inter-

* CrI. A. No. 54 of 1963.

vened and nothing untoward happened on that occasion. On 26th March, 1961 at about 6 P.M. when Rakkha Singh and his two sons Karam Singh and Manjit Singh and their neighbour Sardar Anokh Singh were sitting in a thatched hut, the appellant armed with a gun, and his two brothers armed with *lathis* arrived near the hut, and appellant shouted to Karam Singh asking him to come out of the hut. On Karam Singh's emerging from the hut appellant told him that since he (Karam Singh) "did not settle the dispute regarding the sugarcane he would settle his account just then", and opened fire causing injuries to Karam Singh on the chest which resulted in death instantaneously. On hearing the report of gun fire Rakkha Singh, his son Manjit Singh and Sardar Anokh Singh came out of the thatched hut. Manjit Singh tried to catch hold of the appellant and his brothers but without success. Rakkha Singh then went to the Police Station Puranpur and lodged the first information at 7-45 A.M. At the trial of the appellant and his brothers before the Court of Session, Manjit Singh, Anokh Singh and Rakkha Singh were examined as persons who were present at the scene of offence and witnessed the assault on Karam Singh. Manjit Singh, and Anokh Singh however did not support the prosecution case. They stated that at about 8 or 9 P.M. on 26th March, 1961 when they were in their respective houses they heard report of gun fire and on coming out came to learn from some person that Karam Singh was fired upon by 'some Sardar who was wearing a mask.' The witnesses were cross-examined by the prosecutor with leave of the Court in the light of their statements recorded by the Sub-Inspector of Police in the course of his investigation but they denied having made the statements that the appellant and his two brothers had come to Shanti Nagar at 6 P.M. on the day of occurrence and that the appellant had killed Karam Singh by causing him gunshot injuries. But Rakkha Singh supported the prosecution case. He spoke about the dispute about sugarcane, and also about the quarrel between Karam Singh and the appellant on 22nd March, 1961. He then stated that on 26th March, 1961 at about 6 P.M. the appellant and his two brothers had come near his hut, that the appellant had called out Karam Singh and after shouting that as Karam Singh was not settling the matter of sugarcane they "were going to settle his matter" had fired a shot killing Karam Singh instantaneously. In cross examination he stated that from the hut in which he was sitting he could not see the faces of the assailants but on hearing the report of gun fire he came out of the hut and saw the assailants running away, and that he was able to recognise them by "their gait and voice."

The learned Sessions Judge accepted the testimony of Rakkha Singh and, in so far as it inculpated the appellant, convicted him of the offence of causing the death of Karam Singh. He however held that the two brothers of the appellant were not proved to be guilty of the offence charged against them and acquitted them. The High Court of Allahabad agreed with the finding recorded by the Court of First Instance and confirmed the sentence of death passed against the appellant.

The conclusion recorded by the Court of First Instance and affirmed by the High Court is based upon appreciation of evidence and no question of law arises therefrom. Normally this Court does not proceed to review the evidence in appeals in criminal cases, unless the trial is vitiated by some illegality or irregularity of procedure or the trial is held in a manner violative of the rules of natural justice resulting in an unfair trial or unless the judgment under appeal has resulted in gross miscarriage of justice. Rakkha Singh deposed that he had been able to recognise the appellant from his 'voice and gait.' Rakkha Singh was the father-in-law of the appellant, and had during the last few days before the death of Karam Singh seen the appellant frequently. Only four days before the incident there was a quarrel between Karam Singh and the appellant about the delivery of sugarcane crop and the appellant and his brothers had retired from the scene at the intervention of Rakkha Singh, greatly annoyed. It is true that the evidence about identification of a person by the timbre of his voice depending upon subtle variations in the overtones when the person recognising is not familiar with the person recognised may be somewhat risky in a criminal trial. But the appellant was intimately

known to Rakkha Singh and for more than a fortnight before the date of the offence he had met the appellant on several occasions in connection with the dispute about the sugarcane crop. Rakkha Singh had heard the appellant and his brothers calling Karam Singh to come out of the hut and had also heard the appellant, as a prelude to the shooting referring to the dispute about sugarcane. In the examination-in-chief Rakkha Singh has deposed as if he had seen the actual assault by the appellant, but in cross-examination he stated that he had not seen the face of the assailant of Karam Singh. He asserted however that he was able to recognize the appellant and his two brothers from their 'gait and voice.' It cannot be said that identification of the assailant by Rakkha Singh, from what he heard and observed was so improbable that we would be justified in disagreeing with the opinion of the Court which saw the witness and formed its opinion as to his credibility and of the High Court which considered the evidence against the appellant and accepted the testimony.

Manjit Singh and Anokh Singh have tried to shield the appellant by deposing that the assault took place at about 9 P.M. and that they were informed that the assailant had put on a mask. Their statements recorded in the course of investigation were inconsistent with the tenor of their evidence in Court. It is true that there was some delay in lodging the first information: the offence took place according to Rakkha Singh at 6 P.M. on 26th March, 1961 and information at the Police Station Puranpur was lodged at 7-45 A.M. on 27th March, 1961. The distance between the Police Station and the village Shanti Nagar, as the crow flies, is about 15 miles but by the public transport system one has to take a long detour to reach Puranpur Police Station. Rakkha Singh says that to avoid delay and to secure the presence of a Police Officer he secured a jeep from Sampurna Nagar Union and proceeded to the Police Station and brought the Sub-Inspector of Police to Shanti Nagar in the same jeep. We do not think, having regard to the circumstances, that there has been any such gross delay in lodging the first information as would justify us in throwing doubt on the truth of the story of Rakkha Singh. It appears that there are two Police Outposts near Shanti Nagar—one at a distance of about two miles and another at a distance of five miles but the officer in charge of the Police Outposts had, it is conceded by Counsel for the appellant, no authority to record a first information. Rakkha Singh desired to lodge a complaint about the commission of the offence of murder, he was not apprehensive of any violence at the hands of the appellant and his brothers, and if he did not contact the officer at the Police Outposts, who could not record his complaint, no fault can be found against him.

The post-mortem examination of the stomach contents of Karam Singh disclosed that there was 8 ozs. of half-digested food and that indicated that the death was caused some two hours after the last meal was taken by Karam Singh. Counsel for the appellant said that the condition of the stomach supported the version of Manjit Singh and Anokh Singh, but Rakkha Singh has deposed that Karam Singh had taken at about 4 P.M. tea and *pokodas*. That explains the presence of half-digested food in the stomach. The case for the prosecution undoubtedly depends for its support upon the testimony of a single witness, who did not claim to have identified the assailant by seeing his face. But we do not think that is a circumstance which would justify us in departing from the rule normally followed by this Court. The offence was committed when there was sufficient day-light: the assailant was intimately known to Rakkha Singh and the witness had heard the appellant's voice speaking about the dispute which was pending between him and the appellant. We do not think that the circumstance that Rakkha Singh had not seen the face of the appellant when the latter was running away is a ground for discarding his testimony. The conviction of the appellant must therefore be confirmed. Sentence passed by the Trial Court is, in the circumstances of the case, the only appropriate sentence.

Before parting with the case, we think it necessary to observe that the Committing Magistrate in this case erred in committing the accused to the Court of Session

without recording the evidence of all the witnesses to the actual commission of the offence. Under the Code of Criminal Procedure as amended by Act XXVI of 1955, the Magistrate holding committal proceedings is required to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged, and if the Magistrate is of opinion that it is necessary in the interest of justice to take the evidence of any one or more of the other witnesses for the prosecution, he may take such evidence also : section 207-A (4). The Magistrate has in the inquiries relating to charges for serious offences like murder the power and indeed a duty in the interest of the accused as well as in the larger interest of the public to record the evidence of other witnesses who throw light on the case. Examination of witnesses to the actual commission of the offence should in inquiries for committal on charges for such serious offences be the normal rule. The prosecutor is expected ordinarily to examine in the Court of the Committing Magistrate all witnesses to the actual commission of the offence : if without adequate reasons he fails to do so, the Magistrate is justified and in enquiries on charges for serious offences is under a duty to call witnesses who would throw light upon the prosecution case. Before the Code was amended by Act XXVI of 1955 it was necessary for the Magistrate holding the inquiry to record the evidence of all the important witnesses. With a view to shorten delays in the proceeding preliminary to bringing the accused to trial, the Legislature has by enacting section 207-A conferred a discretion upon the Magistrate in the matter of examination of witnesses not produced by the prosecutor. Exercise of that discretion must be judicial it is not to be governed by any set rules or standards, but must be adjusted in the light of circumstances of the case. The Magistrate is again not to be guided by the attitude of the prosecutor. He must of course consider the representation relating to the examination of witnesses by the prosecutor, but in considering whether it is necessary in the interest of justice to take evidence of any one or more of the other witnesses for the prosecution, he must have due regard to the nature and gravity of the offence, the interest of the accused and the larger interest of the public, and the defence if any disclosed by the accused. A Magistrate failing to examine witnesses to the actual commission of the offence because they are not produced, without considering whether it is necessary in the interest of justice to examine such witnesses, in our judgment, fails in the discharge of his duties.

There is nothing in the decision of this Court in *Shri Ram Daya Ram and others v. The State of Maharashtra*¹, which may support the view that in the matter of examination of witnesses, especially in the inquiry relating to serious charges like murder and culpable homicide, the Magistrate is to be guided by the prosecutor. It is the duty of the Magistrate to examine all such witnesses as may be produced by the prosecutor as witnesses to the actual commission of the offence alleged, but his duty does not end with such examination. He must apply his mind to the documents referred to in section 173, and the testimony of witnesses, if any, produced by the prosecutor and examined, and consider whether in the interest of justice it is necessary to record the evidence of other witnesses. In inquiries relating to charges for serious offences like murder, normally the Magistrate should insist upon the examination of the principal witnesses to the actual commission of the offence. Failure to examine the witnesses may be justified only in exceptional cases. This is so because the Magistrate in committing a person accused of an offence for trial has to perform a judicial function which has a vital importance in the ultimate trial, and a slipshod or mechanical dealing with the proceeding must be deprecated.

The appeal fails and is dismissed.

K.S.

Appeal dismissed.

1. (1961) 1 S.C.J. 677 : (1961) 1 M.L.J. (S.C.) 221 : (1961) 1 An.W.R. (S.C.) 221 : (1961)

M.L.J. (CrI) 342 : A.I.R. 1961 S.C. 674.

THE SUPREME COURT OF INDIA.
(Criminal Appellate Jurisdiction.)

PRESENT :—P.B. GAJENDRAGADKAR, K.N. WANCHOO AND K.C. DAS GUPTA, JJ.
Raghubir Prosad Dudhwalla .. Appellant*

v.

.. Respondents.

Chamanlal Mehra and another

Criminal Procedure Code (V of 1898), section 479-A (enacted by Amendment Act of 1955)—Applicability.
Assuming that where action could have been taken under section 479-A of the Code of Criminal Procedure but was not taken by the Criminal Court concerned, for offences of giving false evidence in any stage of a judicial proceeding or for intentional fabrication of false evidence for the purpose of being used in any stage of a judicial proceeding no action can be taken under section 476 of the Code, it is not further correct to say that no such action under section 476 can be taken even in respect of offences of forgery or conspiracy to commit forgery. Section 479-A has no application to prosecution for offences other than an offence under section 193 and cognate sections in Chapter XI of the Penal Code and as regards other offences sections 476, 477 and 479 continue to apply even after the enactment of section 479-A.

Appeal by Special Leave from the Judgment and Order dated 16th September 1960 of the Calcutta High Court in Criminal Appeal No. 56 of 1958.

D.N. Mukherjee, Advocate, for Appellant.

B.K. Bhattacharya, Senior Advocate, (*Sukumar Ghose* Advocate, with him), for Respondent. No. 1.

P.K. Chatterjee and P.K. Bose, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

Das Gupta, J.—This appeal by Special Leave is against a decision of the Calcutta High Court.

The appellant was examined as a witness for the prosecution in the Court of the Additional Chief Presidency Magistrate, Calcutta, in a case instituted by one Mayadas Khanna against the respondent, Chamanlal Mehra and two other persons under section 504 and 506 of the Indian Penal Code. That case ended in the acquittal of the accused persons on 10th May, 1957. On 28th June 1957 an application was made in the Magistrate's Court under section 476 of the Code of Criminal Procedure alleging that this appellant and some of the other witnesses, including Mayadas Khanna, examined for the prosecution in that case had,

“given false evidence and or have fabricated false evidence for the purpose of being used in proceedings before the Court and have used false and or fabricated evidence as genuine and or have forged document and or have used as genuine forged documents and each of the accused has abetted others in commission of these offences.”

and praying that after the necessary enquiry a complaint be made to the Chief Presidency Magistrate against them for the offences committed by these acts. It appears that the learned Magistrate Mr. Jahangir Kabir who had disposed of the criminal case against Chamanlal Mehra was no longer available and the application under section 476 was transferred by the Chief Presidency Magistrate to the file of Mr. J.M. Bir, Presidency Magistrate, for disposal. For this purpose the Chief Presidency Magistrate nominated Mr. J.M. Bir as success of the trying Magistrate. Mr. Bir was of opinion that section 479-A of the Code of Criminal Procedure was a complete bar against any action being taken by him in respect of this appellant and others who were merely witnesses on the side of the complainant in the criminal case. He therefore directed a complaint to be lodged only against Mayadas Khanna, the complainant, in the criminal case under section 504 and section 506 of the Indian Penal Code and rejected the application as against the rest.

On appeal by Chamanlal Mehra against the Magistrate's refusal to make a complaint against the other persons the High Court of Calcutta held that section 479-A of the Code of Criminal Procedure had no application to the offence of committing forgery or being a party to a criminal conspiracy to commit forgery. The

10th May, 1963.

High Court considering it expedient in the interests of justice that a complaint should be made against this appellant in respect of an offence under section 467 and section 467/120-B of the Indian Penal Code that he appeared to have committed, set aside the order of the Magistrate in respect of this appellant and made an order that such a complaint be made.

The correctness of the High Court's view that section 479-A has no application to offences under section 467 and section 467/120B and does not bar an action being taken against a witness under section 476 of the Code of Criminal Procedure for such offences is challenged before us. The relevant portion of section 479-A which was inserted in the Code of Criminal Procedure by the Amendment Act of 1955 runs thus :—

"Notwithstanding anything contained in sections 476 to 479 inclusive, when any Civil, Revenue or Criminal Court is of opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial proceedings or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding, and that, for the eradication of the evils of perjury and fabrication of false evidence and in the interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, at the time of the delivery of the judgment or final order disposing of such proceeding, record a finding to that effect stating its reasons therefor and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof in writing signed by the presiding officer of the Court setting forth the evidence which, in the opinion of the Court, is false or fabricated and forward the same to a Magistrate of the First Class having jurisdiction."

There is divergence of judicial opinion on the question whether if action could have been taken by the criminal Court under section 479-A but was not taken, action can still be taken under section 476 of the Code of Criminal Procedure. But that question does not arise for consideration before us. The question here is : Assuming that where action could have been taken under section 479-A of the Code of Criminal Procedure but was not taken by the criminal Court concerned, for offences of giving false evidence in any stage of a judicial-proceeding or for intentional fabrication of false evidence for the purpose of being used in any stage of a judicial proceeding, no action can be taken under section 476 of the Code of Criminal Procedure, is it further correct to say that no such action under section 476 of the Code of Criminal Procedure can be taken even in respect of offences of forgery or conspiracy to commit forgery ?

We do not see any reason why this should be so. The special procedure of section 479-A is prescribed only for the prosecution of a witness for the act of giving false evidence in any stage of judicial proceedings or for fabrication of false evidence for the purpose of being used in any stage of a judicial proceeding. There is nothing in the section which precluded the application of any other procedure prescribed by the Code in respect of other offences. In applying the principle that a special provision prevails over a general provision, the scope of the special provision must be strictly construed in order to find out how much of the field covered by the general provision is also covered by the special provision. Examining the special procedure prescribed by section 479-A in that light, it is important to notice that the act of intentionally giving false evidence in any stage of a judicial proceeding and the act of fabricating false evidence for the purpose of being used in any stage of a judicial proceeding mentioned in section 479-A of the Code of Criminal Procedure are the acts which are made punishable under section 193 of the Indian Penal Code and cognate sections in Chapter XI.

It appears clear to us therefore that it is prosecution in respect of section 193 of the Indian Penal Code and cognate sections in Chapter XI that is dealt with under section 479-A. If the Legislature had intended that the special procedure would apply to offences other than offence under section 193 of the Indian Penal Code and cognate sections in Chapter XI it would have used clear words to that effect. It will be unreasonable to read into section 479-A the meaning that where a person who appears to have committed an offence under section 193 of the Indian Penal Code—by giving false evidence or fabricating false evidence—appears to have committed some other offence also, say, forgery, for the very purpose of fabrica-

ting false evidence, complaint for such other offence also can be made under section 479-A of the Code of Criminal Procedure.

We are therefore of opinion that section 479-A has no application to prosecution for offences other than an offence under section 193 and cognate sections in Chapter XI and that as regards other offences sections 476, 477, 478, and 479 continue to apply even after the enactment of section 479-A.

Whether the High Court is right or wrong in its view that the appellant appeared *prima facie* to have committed offences under section 467 and section 467/120-B of the Indian Penal Code has not been argued before us and we express no opinion either way on that matter.

The appeal is dismissed.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—B P. SINHA, *Chief Justice*, J. C. SHAH, AND N. RAJAGOPALA AYYANGAR, JJ.

Cherubin Gregory

.. Appellant*

v.

The State of Bihar

.. Respondent.

Penal Code (XLV of 1860), section 304-A—Occupier of property fixing up naked live wire to prevent trespassers entering his premises—Death caused to a trespasser by contact with the wire—Offence.

It is, no doubt, true that the trespasser enters other's property at his own risk and the occupier owes no duty to take any reasonable care for his protection, but at the same time the occupier is not entitled to do wilfully acts such as set a trap or set a naked live wire with the deliberate intention of causing harm to trespassers or in reckless disregard of the presence of the trespassers. Where the voltage of the current passing through the naked wire is high enough to be lethal, there could be no dispute that charging it with current of that voltage was a "rash act" done in reckless disregard of the serious consequences to people coming in contact with it. Where death is caused even of a trespasser by contact with such a live wire the occupier will be guilty of an offence under section 304-A of the Indian Penal Code.

It would not be proper or justifiable to permit the invocation of Common Law principles outside the Penal Code (which defines with particularity the ingredients of a crime and the defences open to an accused charged with any of the offences there set out) for the purpose of treating what on the words of the statute is a crime into a permissible or other than unlawful act.

Appeal by Special Leave from the Judgment and Order dated 20th September 1961, of the Patna High Court in Criminal Appeal No. 124 of 1960.

D. Goburdhan, Advocate, for Appellant.

S.P. Verma, Advocate, for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This is an appeal by Special Leave against the judgment of the High Court of Patna dismissing an appeal by the appellant against his conviction and the sentence passed on him by the Sessions Judge, Champaran.

The appellant was charged with an offence under section 304-A of the Indian Penal Code for causing the death of one Mst. Madilen by contact with an electrically charged naked copper wire which he had fixed up at the back of his house with a view to prevent the entry of intruders into his latrine. The deceased Madilen was an inmate of a house near that of the accused. The wall of the latrine of the house of the deceased had fallen down about a week prior to the day of the occurrence—16th July, 1959, with the result that her latrine had become exposed to public view. Consequently the deceased, among others started using the latrine of the accused. The accused resented this and made it clear to them that they did not have his permission to use it and protested against their coming there. The oral warnings, however, proved ineffective and it was for this reason that on the facts, as found by

the Courts below, the accused wanted to make entry into his latrine dangerous to the intruders.

Though some of the facts alleged by the prosecution were disputed by the accused, they are now concluded by the findings of the Courts below and are no longer open to challenge and, indeed, learned Counsel for the appellant did not attempt to controvert them. The facts, as found, are that in order to prevent the ingress of persons like the deceased into his latrine by making such ingress dangerous (1) the accused fixed up a copper wire across the passage leading up to his latrine, (2) that this wire was naked and uninsulated and carried current from the electrical wiring of his house to which it was connected, (3) there was no warning that the wire was live, (4) the deceased managed to pass into the latrine without contacting the wire but that as she came out her hand happened to touch it and she got a shock as a result of which she died soon after. On these facts the Courts below held that the accused was guilty of an offence under section 304-A of the Indian Penal Code which enacts :

"304-A. Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

The accused made a suggestion that the deceased had been sufficiently warned and the facts relied on in this connection were two : (1) that at the time of the accident it was past day-break and there was therefore enough light, and (2) that an electric light was burning some distance away. But it is manifest that neither of these could constitute warning as the condition of the wire being charged with electric current could not obviously be detected merely by the place being properly lit.

The voltage of the current passing through the naked wire being high enough to be lethal, there could be no dispute that charging it with current of that voltage was a 'rash act' done in reckless disregard of the serious consequences to people coming in contact with it.

It might be mentioned that the accused was also charged before the learned Sessions Judge with an offence under section 304 of the Indian Penal Code but on the finding that the accused had no intention to cause the death of the deceased he was acquitted of that charge.

The principal point of law which appears to have been argued before the learned Judges of the High Court was that the accused had a right of private defence of property and that the death was caused in the course of the exercise of that right. The learned Judges repelled this defence and, in our opinion, quite correctly. The right of private defence of property which is set out in section 97 of the Indian Penal Code, is as that section itself provides, subject to the provisions of section 99 of the Code. It is obvious that the type of injury caused by the trap laid by the accused cannot be brought within the scope of section 99, nor of course of section 103 of the Code. As this defence was not pressed before us with any seriousness it is not necessary to deal with this at more length.

Learned Counsel, however, tried to adopt a different approach. The contention was that the deceased was a trespasser and that there was no duty owed by an occupier like the accused towards the trespasser and therefore the latter would have had no cause of action for damages for the injury inflicted and that if the act of the accused was not a tort, it could not also be a crime. There is no substance in this line of argument. In the first place where we have a Code like the Indian Penal Code which defines with particularity the ingredients of a crime and the defences open to an accused charged with any of the offences there set out we consider that it would not be proper or justifiable to permit the invocation of some Common Law principle outside that Code for the purpose of treating what on the words of the statute is a crime into a permissible or other than unlawful act. But that apart, learned Counsel is also not right in his submission that the act of the accused as a result of which the deceased suffered injuries resulting in her death was not an actionable wrong. A trespasser is not an outlaw, a *caput lupinæ*. The mere fact

that the person entering a land is a trespasser does not entitle the owner or occupier to inflict on him personal injury by direct violence and the same principle would govern the infliction of injury by indirectly doing something on the land the effect of which he must know was likely to cause serious injury to the trespasser. Thus in England it has been held that one who sets spring-guns to shoot at trespassers is guilty of a tort and that the person injured is entitled to recover. The laying of such a trap, and there is little difference between the spring-gun which was the trap with which the English Courts had to deal and the naked live wire in the present case, is in truth "an arrangement to shoot a man without personally firing a shot." It is no doubt, true that the trespasser enters the property at his own risk and the occupier owes no duty to take any reasonable care for his protection, but at the same time the occupier is not entitled to do wilfully acts such as set a trap or set a naked live wire with the deliberate intention of causing harm to trespassers or in reckless disregard of the presence of the trespassers. As we pointed out earlier, the voltage of the current fed into the wire precludes any contention that it was merely a reasonable precaution for the protection of private property. The position as to the obligation of occupiers towards trespassers has been neatly summarised by the Law Reform Committee of the United Kingdom in the following words :

"The trespasser enters entirely at his own risk, but the occupier must not set traps designed to do him bodily harm or to do any act calculated to do bodily harm to the trespasser whom he knows to be or who to his knowledge is likely to be on his premises. For example, he must not set man-traps or spring-guns. This is no more than ordinary civilised behaviour."

Judged in the light of these tests, it is clear that the point urged is wholly without merit.

The appeal fails and is dismissed.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT:—B.P. SINHA, *Chief Justice*, M. Hidayatullah and K.C. Das Gupta JJ.
Chandi Kumar Das Karmarkar and another .. *Appellants**
v.

Abanidhar Roy .. *Respondent.*

Penal Code (XLV of 1860), section 379—Gist of offence of theft—Taking movable property under bona fide claim of right—If theft.

There can be theft of fish from a tank which belongs to another and is in his possession, if the offender catches them without the consent of the owner and without any *bona fide* claim of right.

Where the taking of movable property in assertion of a *bona fide* claim of right, the act, though it may amount to a civil injury does not fall within the offence of theft.

A claim of right in good faith if reasonable, saves the act of taking from being theft and where such a plea is raised by the accused it is mainly a question of fact whether such belief exists or not.

Appeal by Special Leave from the Judgment and Order, dated 17th June, 1960 of the Calcutt High Court in Criminal Appeal No. 505 of 1959.

Nuruddin Ahmed and B.P. Maheshwari, Advocates, for Appellants.

S.C. Majumdar, Advocate, for Respondent.

P.K. Chatterjee, Advocate for *P.K. Bose*, Advocate, for the State of West Bengal. (Upon notice being issued)

The Judgment of the Court was delivered by

Hidayatullah, J.—The two appellants who have filed this appeal by Special Leave have been convicted under section 379, Indian Penal Code and sentenced to a fine of Rs. 100 each or in default of fine to suffer simple imprisonment for one month by the High Court of Calcutta after reversing their acquittal by the Additional Sessions Judge, Burdwan. Originally five named and sixteen unnamed persons were

charged under sections 147, 447, 379 and 504/352, Indian Penal Code but the Magistrate, 1st Class, Katwa convicted the two appellants under section 379, Indian Penal Code only. The charge under section 379, Indian Penal Code against them was that on 13th and or 14th day of January, 1958, they committed theft of fish by fishing in a tank called Nutan pukur in Kutalghosh mouza P.S. Mongolkote which was in the possession of the complainant Abanidhar Roy, the Respondent before us. Nutan pukur is a tank which with its banks and wet and dry portions measures about 7.21 acres. The water covers about $\frac{3}{4}$ of the area. In the Parcha of Mouza Kotalghosh, the two appellants with three others are shown as tenants with their interest described as "settled raiyot Mukurari" and the sixteen annas superior interest is described as belonging to Banbehari Dutta and others.

The complainant Abanidhar Roy claimed to be in possession of Nutan pukur as a result of bhag settlement for five years with Sailesh Chandra Banerjee (P.W. 2) under an Amalnama, dated 15th June, 1959. His case was that after obtaining possession he had reared fish in this tank by putting in fry but the present appellants and some others caught fish on the abovementioned dates after fish had grown to be right size. The defence of the appellants was that they were recorded as tenants in respect of this tank under a jama of Rs. 4-6-0 and were in possession. They denied that they caught fish on the two dates or at all and in the alternative contended that even if they did, it was in the *bona fide* exercise of their claim of right. The complainant stated that the interest of the Duttas was sold in a revenue sale and was purchased by Sailesh Chandra Banerjee and further that Banerjee had obtained possession of the tank after a decree in a title suit filed by him against the Duttas and the present appellant and some others. That suit was T.S. No. 203 of 1954 in the Court of the Second Munsiff, Burdwan. The decree in that suit was passed *ex parte* on 6th December, 1954. On the strength of that decree Sailesh Chandra claimed to have obtained possession of the tank on 27th February, 1955 (*vide* warrant for delivery of possession and Bailiff's report Exhibits 3 and 4). The appellants and some other defendants however moved the learned Second Munsiff, Burdwan under Order 9, rule 13, Civil Procedure Code to set aside the *ex parte* decree on the averment that Sailesh Chandra Banerjee in collusion with certain Court functionaries had suppressed the summons and it was not served on the defendants in the case. That case was registered as Misc. Case No. 64 of 1955 and on 26th July, 1955, the *ex parte* decree was set aside on the ground that the defendants were not served. Sailesh Chandra Banerjee filed a revision application in the High Court but it was dismissed on 14th January, 1957. During these proceedings Sailesh Chandra Banerjee had given an undertaking that he would not cut down any trees on the banks till the disposal of the miscellaneous case thereby admitting that there was a dispute with respect to the ownership and possession of the tank.

The Magistrate, 1st Class, Katwa who decided the criminal case stated his conclusion thus :

"even if the accused *bona fide* believed, rightly or wrongly that as soon as the *ex parte* decree was set aside, they were entitled to possess the tank, they cannot be regarded to have *bona fide* believed that they were entitled to catch fish and take it wholly without giving the bhagiar P.W. 1 who grew the fish his halfshare. So I find that the accused are not entitled to come under a *bona fide* claim of right."

The Additional Sessions Judge, Burdwan held that the appellants had acted in the *bona fide* exercise of their claim of right and they could not be held guilty of an offence of theft under section 379, Indian Penal Code. The High Court on appeal pointed out that the two concurrent findings were that Abanidhar Roy was in physical possession of the tank from 15th June, 1955 as a lessee from Sailesh Chandra Banerjee and that the appellants had caught fish from the tank on two dates. On these findings Mr. Justice S. K. Niyogi posed the questions which arose for decision in the case in the following words :

"So the important question that arises for decision is whether in removing the fishes from the tank in the actual possession of the complainant the accused persons may be said to have caught the same dishonestly and the said removal was for the purpose of making wrongful gain to themselves."

This question was the right question to consider. Niyogi, J., on an examination of the above facts held that the removal of fish by the appellants was dishonest and they did it with a view to making a wrongful gain to themselves and that the "finding of the learned Additional Sessions Judge must be interfered with". In this appeal it is contended that the learned single Judge erred in reversing this finding.

The offence of theft consists in the dishonest taking of any moveable property out of the possession of another without his consent. Dishonest intention exists when the person so taking the property intends to cause wrongful gain to himself or wrongful loss to the other. This intention is known as *animus furandi* and without it the offence of theft is not complete. Fish in their free state are regarded as *ferae naturae* but they are said to be in the possession of a person who has possession of any expanse of water such as a tank, where they live but from where they cannot escape. Fishes are also regarded as being in the possession of a person who owns an exclusive right to catch them in a particular spot known as a fishery but only within that spot. There can thus be theft of fish from a tank which belongs to another and is in his possession, if the offender catches them without the consent of the owner and without any *bona fide* claim of right.

Now the ordinary rule that *mens rea* may exist even with an honest ignorance of law is sometimes not sufficient for theft. A claim of right in good faith, if reasonable, saves the act of taking from being theft and where such a plea is raised by the accused it is mainly a question of fact whether such belief exists or not. This Court in *Suvvari Sanyasi Apparao and another v. Boddepalli Lakhminarayana and another*¹, observed as follows :

"It is settled law that where a *bona fide* claim of right exists, it can be a good defence to a prosecution for theft. An act does not amount to theft, unless there be not only no legal right but no appearance of colour of a legal right."

By the expression "colour of a legal right" is meant not a false pretence but a fair pretence, not a complete absence of claim put a *bona fide* claim, however weak. This Court observed in the same case that the law was stated in 2 East Plees of the crown page 659 to be :

"If there be in the prisoner any fair pretence of property or right, or if it be brought into doubt at all the Court will direct an acquittal"

and referred to 1 Hales pleas of the crown page 509 that "the best evidence is that the goods were taken quite openly". The law stated by East and Hale has always been the law on the subject of theft in India and numerous cases decided by Indian Courts are to be found in which these principles have been applied.

Niyogi, J., in his judgment also referred to some of the decisions of the Calcutta High Court and we find ourselves in particular agreement with the following statement of the law in *Hamid Ali Bepari v. Emperor*² :

"It is not theft if a person, acting under a mistaken notion of law and believing that certain property is his and that he has the right to take the same. removes such property from the possession of another."

The question that arises is whether the finding of the Additional Sessions Judge, Burdwan that there was no dishonest intention could be said to be wrong and required to be set aside? In this case the complainant filed the complaint against 21 persons charging them with numerous offences one of them being theft. The Magistrate summoned only three persons and framed a charge under section 379, Indian Penal Code. One of the three persons was acquitted and the two appellants were convicted. It is clear that the case was much exaggerated by the complainant. Theft was said to have taken place on the 13th and 14th January, 1958. There was hardly any evidence about the occurrence on the first date and even the evidence in respect of the second day was slender and interested. But as it has been believed we do not say more and accept the finding that fish were caught by the appellants at least on one day. The accused no doubt denied catching fish and this might have shown that they had a dishonest intention but they also brought evidence to prove alternatively that after clearing the tank of weeds they had caught fish for some reli-

1. (1962) 2 S.C.J. 469=(1952) 2 M.L.J. (S.C.) 109=(1952) 2 An.W.R. (S.C.) 109 : (1962) M.L.J. (Cr.) 629: (1962) 1 S.C.R. (Supp.) 8.
2. I.L.R. 52 Cal. 1015.

gious ceremony not on the two dates alleged but four days earlier. This was said to have been done under a *bona fide* claim of right and their plea was accepted by the Additional Sessions Judge, Burdwan.

Niyogi, J., reversed the finding by taking into consideration certain other circumstances. The learned Judge discarded the evidence of the Record of Rights on the ground that there was nothing to show that the entry was made before the date of the alleged occurrence or had influenced the appellants in believing *bona fide* that they had a claim of right to the tank and the fish in it. He also referred to the possession of Sailesh Chandra Banerjee obtained by him under the *ex-parte* decree which possession, according to the learned Judge, continued. He also pointed out that the appellants caught fish only when the fry had grown to the right size but there was no assertion of the right on any earlier occasion.

That there was a dispute between the parties which had not till then been decided by the Civil Court goes without saying. The facts do show that the decree was obtained by unfair means and the possession was tainted by fraud. Of course by the setting aside of the *ex-parte* decree possession would not revert without proceedings for restitution, but the circumstances undoubtedly were such that the appellants might well have thought that their possession stood restored. This belief was not lessened by the grant of a temporary injunction and its withdrawal on the assurance of Sailesh Chandra Banerjee that during the pendency of the proceedings he would not exercise certain rights of ownership. Further the transaction between Abanidhar Roy and Sailesh Chandra Banerjee during the pendency of the Civil Case was not binding on the appellants. There was thus a real dispute and in a manner of speaking also a recognition that a rival claim in respect of the tank did exist. In these circumstances it was not improbable that the appellants considered that after the setting aside of the *ex-parte* decree and the giving of the undertaking by Sailesh Chandra Banerjee they were entitled, as the recorded tenants, to catch fish for a ceremony in their house. That they did it only once does not prove lack of *bona fides* but rather the contrary. All the embellishments in the case about unlawful assembly, riot, force and threats have not been believed and the catching of the fish in this big tank with nets was done quite openly.

In our opinion there was an absence of the *animus furandi* and the circumstances bring this case within the rule that where the taking of moveable property is in the assertion of a *bona fide* claim of right, the act, though it may amount to a civil injury, does not fall within the offence of theft. In this view of the matter we are of opinion that the acquittal of the appellants ought not to have been set aside. We accordingly allow the appeal and setting aside the conviction of the appellants order their acquittal. The fines if recovered shall be refunded to them.

K.S.

Appeal allowed

THE SUPREME COURT JOURNAL

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1963

JUDGES OF THE SUPREME COURT OF INDIA.

(1st July, 1963 to 31st December, 1963.)

Chief Justice :

The Hon'ble Mr. Bhuvaneshwar Prasad Sinha.

Puisne Judges :

The Hon'ble Mr. Justice Syed Jafer Imam.

"	"	S. K. Das (upto 3rd September, 1963).
"	"	P. B. Gajendragadkar.
"	"	Amal Kumar Sarkar.
"	"	K. Subba Rao.
"	"	K. N. Wanchoo.
"	"	M. Hidayatullah.
"	"	K. C. Das Gupta.
"	"	J. C. Shah.
"	"	Raghubar Dayal.
"	"	N. Rajagopala Ayyangar.
"	"	J. R. Mudholkar.

The Attorney-General of India :

Shri C. K. Daphtary.

The Solicitor-General of India :

Shri H. N. Sanyal.

The Additional Solicitor-General of India

Shri S. V. Gupte.

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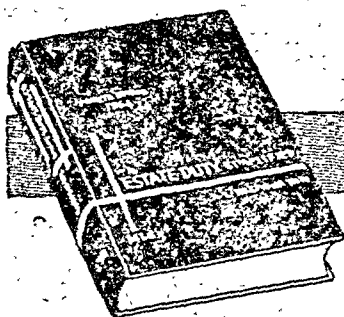
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CAPITAL PUNISHMENT—A RETROSPECT

By

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One of the oldest of our penal institutions is capital punishment. It was a common penalty in the system of private vengeance and must have originated in primitive societies as a reaction to murder and similar other grave offences. In a savage community which had to wage wars as a condition of its existence, life was held very cheap and the sanction for most of the offences was death. It was considered as the only means of wiping out the danger to the group in case of a serious violation of the taboos, when an act was considered impious¹.

The death penalty when dictated by necessity has been advocated by a host of eminent writers. Plato says, 'when a man is never innocent but in sleep it is better that he should die than live'. Galen and Seneca advised the use of capital punishment for the elimination of dangerous incorrigibles². Garofalo insists on the deterrent value of capital punishment³. Lombroso steers a middle course by holding that capital punishment must be held up as a threat to habituals and incorrigibles. Aschaffenburg is of the view that it is justifiable from the standpoint of security⁴. George Ives is of the opinion that hopeless people should be painlessly removed rather than that the State should be put to expenses for the thankless task of maintaining them⁵.

As against this, Jesus Christ repudiated all sense of vengeance. He would have all sinners including criminals reformed rather than annihilated. Protests against this form of punishment can be traced to St. Augustine or to the writings of the New Testament itself. Some would even carry the beginning of the crusade back to the literature of the Old Testament and the murder of Abel by Cain. Sen points out that interesting evidence of opinion against capital punishment is to be found in the Mahābhārata (Sāntiparva) in which there is a discussion between King Dyumatsena and his son Prince Satyavan. Quoting certain passages,⁶ the author

1. Robertson Smith has said that in early society ".....every offence to which death or outlawry is attached was viewed primarily as a breach of holiness; for example marriage within the kin and incest are breaches of the holiness of the tribal blood which would be supernaturally avenged if men overlooked them". *Religion of the Semites* (London, 1901), p. 163.

2. Pillai, *Principles of Criminology*, (1924), p. 571.

3. Garofalo, *Criminology* (Boston, 1914), pp. 378-381.

4. Aschaffenburg, *Crime and its repression*, p. 266.

5. Note 2, *supra*, p. 571.

6. A number of men have been brought out for execution at the command of his father. Prince Satyavan gives vent to his thoughts thus: "Sometimes virtue assumes the form of sin and sin assumes the form of virtue. It is not possible that the destruction of individuals can ever be a virtuous act." Thereupon Dyumatsena observes, "If the sparing of those who should be killed be virtuous, if robbers be spared, O, Satyāvan, all distinction between virtue and vice will disappear." Satyāvan rejoins: "Without destroying the body of the offender, the King should punish him as ordained by the scripture. The King should not act otherwise, neglecting to reflect upon the character of the offence and upon the science of morality. By killing the wrong doer, the King kills a large number of innocent men. Behold! By killing a single robber his wife, mother, father and children all are killed. When injured by wicked persons the King should, therefore, think seriously on the question of punishment. Sometimes a wicked person is seen to imbibe good conduct from a pious person. It is seen that good children spring from wicked persons. The wicked, therefore, should not be exterminated. The extermination of the wicked is not in consonance with eternal law. By punishing them gently, by depriving them of all their riches, by chains and imprisonment, by disfiguring them they may be made to expiate their offences. Their relatives should not be punished by infliction of capital punishment on them." Sen, *Penology, Old and New*, Tagore Law Lectures, 1929, pp. 93-95.

observes that some of the most telling arguments against capital punishment were found therein which in the 19th and 20th centuries have begun to agitate the legislators and administrators of the west. They are : the inherent unrighteousness of taking life for life, the unrighteousness of punishing innocent people such as children and dependents by taking the life of the breadwinner of the family, the loss to the State of possible good citizens in the prospective children of the condemned, and the loss to the State of the individual who might have been reformed and become a useful citizen. This shows that the ancient Hindu Penologists were keenly alive to this vexed problem of sociology and penal philosophy of the present era.

Abuse of this form of punishment led to a reaction against the same from the beginning of the sixteenth century. It has been said that in 1780 there were about 240 capital crimes in England and no less than 72,000 people were during the reign of Henry VIII, reported to have been executed mostly for trivial offences⁷. For the modern period, the logical starting point for this crusade is the year 1762, when Beccaria wrote his essay on Crimes and Punishments. Beccaria maintained that since man was not his own creator, he did not have the right to destroy human life, either individually or collectively⁸.

Through Jeremy Bentham and Sir Samuel Romilly, Beccaria's ideas seeped into English thought. The movement to eliminate the widespread application of capital punishment began when Sir Samuel Romilly asked Parliament in 1808 to abolish the death penalty for some of the two hundred or more crimes that were capital offences at that time. By the middle of the nineteenth century only 4 crimes were subject to capital levy and by the middle of the twentieth century, capital punishment for murder has been so restricted that there are now only two or three executions a year.⁹

In our own times, the wisdom and justice of the death penalty has been questioned time and again in various countries of the world including India¹⁰, where capital punishment is still retained on the Statute Book. The late Speaker of the Lok Sabha Mavlankar in 1954 described it as "the last vestige of barbarism."¹¹ Leading modern criminologists have described the whole concept of capital punishment as "scientifically and historically on a par with astrological medicine, the belief in witchcraft, or the rejection of biological evolution."¹²

II.

An attempt is made in this paper to examine the arguments for and against death penalty in a dispassionate manner and to see which way the balance is tilted.

The two most important arguments advanced by the retentionists are that of retribution and deterrence.

The retributive theory is based on the premise that the criminal has committed a terrible crime and as a result an imbalance has been created in society. In order to "get even" or to restore the balance, the criminal ought to die, otherwise, the friends and relatives of the victim, as well as the general public, who demand and expect satisfaction, may take the law into their own hands and may even lynch the criminal. In India, cases where the friends and relatives of the victim or the general public have taken the law into their own hands to kill the murderer are

7. Clifford Kirkpatrick, "The Death Penalty Past and Present" in Julia E. Johnson, *Capital Punishment*, New York, The H. W. Wilson Company (1939), p. 10.

8. Hermann Mannheim (ed.), *Pioneers in Criminology* (1950), pp. 38-39, 45-46.

9. Tuttle, *The Crusade Against Capital Punishment in Great Britain* (1951), p. 1.

10. Attempts for abolition of death penalty were made in the Indian Parliament in 1956, 1958, and 1961. On 24th August, 1956, Shri Mukund Lal Agrawal moved a Bill in the first Lok Sabha for amending the Criminal Law to abolish Capital Punishment. On 23rd November, 1956 the Bill was rejected by the Government.

11. Quoted in *Probation—India*, October, 1956 (Vol. I, No. 1) p. 39.

12. Harry Elmer Barnes and Negley K. Teeters, *New Horizons in Criminology* (3rd Edition), 1961, p. 314.

few and far between. This is due to a variety of historical and social factors¹³. Even in countries like the U.S.A. where lynchings were once common are now on the decline.¹⁴ The argument that there is a possibility of more killings by way of satisfying feelings of revenge need not therefore be considered as an obstacle for the abolition of capital punishment, particularly in the social context of this country.

Further, it may be asked, how can a second death bring "satisfaction" or restore the balance which was tilted by the first murder? Capital Punishment, in fact, brings no sense of relief or satisfaction to the victim's relatives. On the contrary, by a well-planned and properly executed prison labour the murderer may be made to support the victim's family and dependents as is being done in Sweden and other western countries. This is the right way of sympathising with the victim's relatives. Thus, it may be seen that execution of the murderer neither pleases the conscience of the community nor satisfies the friends and relatives of the deceased.

Further, it is obvious that the demand for retribution cannot be permitted to control the policies of the State in its treatment of criminals, for this would tend to encourage and strengthen the very motives that might destroy all collective action. Sheldon Glueck criticises the retributive theory and opines that to "base a policy of social protection upon the hatred of those who commit such acts is both uneconomical and unjust."¹⁵ It appears therefore that Capital Punishment cannot be supported on the theory of retribution.

The second strongest argument for the retention of the death penalty is its supposed deterrent effect. The retentionists contend that the death penalty is far more powerful and effective deterrent than life imprisonment and that it would discourage criminal conduct on the part of those who are aware of its existence. That it is not deterrent and that the argument is purely a historical survival is amply illustrated by the following instances.

(a) Dr. George W. Kirchwey, in a speech made in 1923, illustrated the absurdity of this claim.

On 21st June, 1873, ten men were hanged in Pennsylvania for murderous conspiracy. The New York Herald predicted the wholesome effect of the terrible lesson. "We may be certain", it said editorially, "that the pitiless severity of the law will deter the most wicked from anything like the imitation of these crimes." Yet, the night after this large scale execution, two of the witnesses at the trial of these men had been murdered and within two weeks five of the prosecutors have met the same fate.¹⁶

(b) In U.K. pocket-picking became so common in the crowds assembled to witness the public hangings of pick-pockets that hangings had to be made private.

(c) "The jilted lover who kills his sweetheart, the jealous paramour who murders this mistress and the disillusioned husband who fatally stabs his faithless wife are all rash, impulsive and inflamed persons beyond control... Only after the act has been committed do they reflect upon the futility and enormity of their behaviour. No question of deterrence arises for these classes. In possibly the majority of cases murder is unpremeditated and is the result of some uncontrollable passion, cupidity, lust, revenge, jealousy, anger, fear, pity, despair, self-righteous

13. The Law Commissioners in their report on the Indian Penal Code, at one place observed : "... In this country the danger is on the other side, the people are too little disposed to help themselves ; the patience with which they submit to the cruel depredations of gang-robbers and to trespass and mischief committed in the most outrageous manner by bands of ruffians, is one of the most discouraging symptoms which the state of society in India presents to us...."

14. None of the States in U. S. had a reign of lynch law after the death penalty was abolished. The number of lynchings actually decreased in Washington, Oregon, North Dakota and Arizona after the death penalty was abolished from their codes. Besides, in general, lynchings have been most frequent in the States which have continued to execute criminals.

15. 41 Harvard Law Review, p. 543.

16. Quoted by Barnes and Teeters, Note 12, Supra, p. 315.

ness, political fanaticism and duty"¹⁷ The deterrent effect of capital punishment, certainly cannot function, when murders are committed in such a psychological state of mind. Thus murders committed as a result of psychopathic compulsions or in fits of rage are relatively immune to the deterrent effect of the death penalty. No form of deterrence short of overt physical restraint before the death, could serve to avert such murders. The same is true of those who commit murders as a result of defective personality or highly unfortunate social environment. Nor can the death penalty be supposed to act as an effective deterrent in the case of the professional gunman. He realises that even if sentenced to death, he may have this sentence commuted to life imprisonment and may ultimately be pardoned and restored to a life of freedom.

(d) Punishment of death is selective and so not deterrent in effect. It is not in all cases of murder that death penalty is awarded. In India out of 11,000 homicidal deaths in 1961, death penalty was imposed in less than 200 cases.¹⁸ In other words out of every 110 prosecuted only 2 were hanged or the number executed varied between 1 and 1.8 per cent. What deterrent effect can there be in such circumstances?

Thirdly, some who favour death penalty claim that it is cheaper than the cost of maintaining a prisoner for life, at the taxpayer's expense. Several criticisms have been advanced against this argument. In the first instance, it may sound ridiculous to advance the theory of cost in a social welfare state. Secondly, if this applies to those who are condemned to die, it may be applied to all prisoners who are being maintained at public expense. The same argument Sutherland points out, would apply to many other dependent and pathological classes. Another leading Criminologist Taft observes that it is a "sufficient reply that the injury to humanitarian sentiments involved in wholesale killing of social ineffectives would far more than off-set the saving in money."¹⁹ Thus the argument of economy cannot have much weight in the controversy over the death penalty.

Fourthly, retentionists have argued that capital punishment exerts a eugenic influence. This argument is wholly unsound. Though heredity may cause a certain type of defect in one individual, environment may cause the same type of defect in another. Caldwell observes²⁰ that the overwhelming complexity of the problem would provoke a public demand for nothing less than a very carefully planned and administered series of examinations that science can provide. He further observes that one should not overlook the possibility of using sterilisation as a substitute for execution in many cases, since sterilization would be just as effective as death in preventing procreation.

Lastly, it is contended that it is the only method of eliminating the hopeless enemy of society. It has been argued that escape from prison, commutation of sentence, and pardon are ways that criminals, helped by their friends, have found convenient for escaping life imprisonment. In actual practice, life imprisonment is not always what its name signifies. The retentionists ask: 'why should society have him with the constant menace of his release and subsequent deprivations?' Gillin replies²¹ that it would be begging the question when we assume that any person is a "hopeless' enemy of society. In the present state of our knowledge all that we can do is to rely upon a careful study of the criminal's antecedents, his previous history and his mental and physical condition and arrive at a conclusion as to the probability of his hopelessness. If only we could be sure that he is incorrigible, only then this argument would have some force, otherwise not.

17. "Capital Punishment Move in India", by M. L. Agarwal, Ex-M. P., A.I.R. 1958, Journal, p. 69.

18. The Minister in the Ministry of Home Affairs quoted these figures on the floor of the Parliament in reply to a question relating to death penalty: *Statesman*, dated 20th December, 1963.

19. Taft, *Criminology* (Revised Edition, 1950), p. 330.

20. Caldwell, 'Why is the Death Penalty Retained', *Criminology, A Book of Readings* (1953), p. 543.

21. Gillin, *Criminology and Penology* (3rd Edition), p. 356.

Amongst the several arguments advanced by the abolitionists, the following important ones may now be examined.

(1) Capital Punishment is opposed on the ground that it is irrevocable and irreparable. Borchard has presented some 65 cases of "justice gone astray," of which 29 were erroneous convictions for murder.²²

It may be argued that certain amount of harm would be caused in cases where other forms of punishment are inflicted on innocent men also. But this cannot be helped as this is incidental to the fallibility of human judgment itself. In other cases of punishment, however, there remains room for redress and even to compensate the sufferer, whereas in cases of death no reparation is possible. Bound up with this is the fact that after a person is executed, there is no incentive on the part of anyone to hunt up evidence which might establish his posthumous innocence or the guilt of others.

Shri N. C. Chatterjee while strongly supporting the Bill for the abolition of Capital Punishment in 1956 cited²³ several examples where innocent persons had wrongly been executed. In *Illford* case, the innocent wife of the murderer was also hanged. Another member of Parliament quoted cases where persons were executed ten minutes before the reprieve orders were received.

(2) Death penalty is retributive in nature. This motive in the treatment of the criminal has lost its power in most reflective minds and modern criminologists have denounced the same. It may be conceivable that Capital Punishment may be viewed by the society as a whole as a means of protecting itself by eliminating its enemies. This contention is not entirely valid inasmuch as offenders usually sentenced to death are not necessarily habitual criminals. As the present society can devise effective ways in which the criminal should be dealt with in relation to himself as well as to the society at large, there should be little justification in taking a life away and foreclosing the door of any possible reformation.

(3) It is not reformatory. In fact, Capital Punishment indicates the impossibility of reformation. Theoretically if it is possible to reform a man, no avenue to reformation should be closed and death penalty certainly prevents reformation.

(4) It is not deterrent in effect. It is pointed out that there are no more crimes in which death penalty has been abolished than in those in which it is to be found. Gillin points out that our experience shows that death penalty is not necessary for social protection. Professor Sellin has observed : "The death penalty probably can never be made a deterrent. Its very life seems to depend on its rarity and, therefore, on its ineffectiveness as a deterrent".²⁴ Results of statistical studies in the U.S.A. indicate that Capital Punishment does not have any significant effect on the frequency of crimes punishable with death. Caldwell observes that similar studies conducted throughout western civilisation point to the same conclusion regarding other countries.

(5) It diminishes the certainty of punishment. It is the common experience that juries often will not convict when they know that the penalty is death. Consequently, in those cases the death penalty is the excuse for acquittal and results in the escape of the criminal from social treatment. If Capital Punishment is done away with entirely juries are more likely to convict and thus society is protected in greater measure. Calvert cites a petition by English bankers in 1830 for abolition of the death penalty for forgery on the ground that convictions could not be secured because of the severity of the death penalty and for the authorization of a less severe penalty in order that their property might be protected more adequately.²⁵

22. Borchard, *Constricting The Innocent*, (1932). Lawes has pointed out that between 1889 and 1927, 50 (12.3 per cent) of the 406 persons sent to Sing Sing for execution were found, on reconsideration, to have been sentenced in error ; See Sutherland, *Principles of Criminology* (fifth edition), pp. 297, 298.

23. "Capital Punishment More In India", by M. L. Agarwal, Ex-M. P., A.I.R. 1951 (Jour.), p. 69.

24. Gillins, *Criminology and Penology*, 3rd edon., p. 551.

25. E. R. Calvert, *Capital Punishment in the Twentieth Century* (1927), p. 15.

(6) It violates our humanitarian sentiments : To-day man recoils with great horror than ever before from capital punishment. Society places upon a certain individual this brutalizing task of taking a life that no one of its members wishes himself to take. Men can take life in self-defence or in the heat of passion and have a relieving sense of justification, but to take life in cold blood causes all the humanitarian sentiments developed in thousands of years to revolt.

(7) It creates a morbid sympathy in man and evokes his latent sentiments occasionally resulting in crimes. This morbid sensationalism that surrounds the execution of the penalty is not only a most unhealthy social influence, but may actually deflect towards violence that self-dramatising vanity which so many murderers have been observed to display.

(8) It leaves the family of the offender in misery and poverty by taking away its source of income.

(9) Social conditions have greatly changed since the time when this form of punishment was considered almost indispensable. With advanced police systems, this punishment is not at all necessary nor desirable.

(10) It gives no scope for individualization of punishment as it is not possible to choose from a greater variety of penalties and apply the most suited to the individual concerned. It is not necessarily the same punishment that deters all criminals.

(11) It is not uncommon for men and women to sit in the death house for several years before their cases are finally settled one way or another.²⁶ This long mental torture is a social paradox. The machinery of justice calls for the death penalty but at the same time insists on due process. Much of this could be eliminated if the death penalty were abolished.

A deep reverence for human life is worth more than a thousand executions in the prevention of murder and is in fact the greatest security for human life. John Bright has rightly remarked²⁷ that "Capital Punishment whilst pretending to support reverence for human life, does in fact, tends to destroy it."

With this brief analysis of the arguments in favour and against Capital Punishment, the legal position of the same in the Indian Law may now be examined.

III

Under the Indian law of murder a person may find himself condemned to death on vicarious or constructive liability for the offence committed by someone else, though he might not be conscious of having done any killing or participating in killing. All that the Court has to find is that the accused was one of the unlawful assembly whose common object was 'murder' although there may not have been any common intention and participation by the accused in the actual commission of that offence. Varadachariar, J., of the Federal Court in the case reported in A.I.R. 1944 F.C. 35, found that common intention of crowd and some act on the part of the appellant had both to be inferred from the fact that the deceased was murdered and that the accused was one of the crowd which ran to the place when the deceased was chasing some of the rioters. The death sentence of the High Court was confirmed by the Federal Court. This shows how harsh our law is and the amount of incalculable harm it does to innocent persons.

The Indian Penal Code prescribes death penalty for the following offences : (1) Waging or attempting to wage war, or abetting waging of war against the Government of India (section 121) ; (2) Abetment of mutiny, if mutiny is committed in consequence thereof (section 132) ; (3) Giving or fabricating false evidence upon which an innocent person suffers death (section 194) ; (4) Murder (section 302) ; (5) Murder by life convict (section 303) ; (6) Abetment of suicide of child or insane

26. The well-known case of Caryl Chessman in California, and the "Fiesterville Boys" in Pennsylvania are typical. All awaited death in their respective death houses for some eight or more years. The Pennsylvania men had their sentences commuted to life imprisonment in 1956 after an interminable legal battle. The position in India is no better. Cases are not wanting in India where this torture was experienced for considerably long periods of time.

27. Quoted by Arthur Koestler in *Reflections on Hanging*, (1957).

person (section 305) ; (7) Attempt to murder by a life convict, if hurt is caused (section 307) ; (8) Dacoity with murder (section 396).

Out of the eight different offences for which death penalty has been prescribed only in two case, i.e., murder by a life convict, (section 303) and attempt to murder by a life convict, if hurt is caused (section 307), the Judge is left with no discretion but to punish the offender with death. In all the other six categories of offences the Judge is permitted to exercise his discretion to impose death penalty or a lesser sentence.²⁸

It may now be asked whether we can recommend that Capital Punishment be struck off completely from the Indian Statute Book. Perhaps it may not be advisable to do away with it altogether. Offences under section 121 which threaten the very basis of an organised society and the democratic set-up of functioning therein, may justify the extreme penalty. Further, incorrigible murderers who are beyond the reach of any possibility of reformation may also be treated with Capital Punishment. Imposition of the death penalty for other offences has become questionable in view of the changed concept of punishment in the modern times.

IV

The concept of punishment has undergone radical changes during the past hundred years. It is recognised on all hands that punishment is no longer retributive in the sense of satisfying the feelings of revenge of the victim. The principal object of punishment today is protection of society and this is achieved partly by deterrence, by preventing him (and others) from committing crimes in future. Friedmann observes²⁹ that emphasis is now increasingly laid on the reformatory aspect, the result being that except in the case of incorrigible offenders, the State is employing every means of correction and rehabilitation. In fact, the way in which criminals are treated, has today, become one of the unfailing tests of modern civilisation.

Many countries today have abolished the death penalty, though some of them with qualification. This is eloquent proof that society can control its criminal element without resorting to this extreme type of punishment. Barnes and Teeters observe that "survival of the penalty is due either to lethargy or hysteria."³⁰ It has been abolished in Austria, Belgium, Denmark, Finland, Iceland, Italy, Portugal, Netherlands, Switzerland, Sweden, West Germany, Lithuania, Turkey and Nepal. Most of the Latin American countries have no capital punishment; e.g. Argentina, Ecuador, Columbia, Costa Rica, Peru, Uruguay, Venezuela, Panama and Mexico. The following States in U.S.A. have abolished death penalty : Maine, Michigan, Minnesota, North Dakota, Rhode Island, Wisconsin and Delaware. The Royal Commission of U.K. on Capital Punishment in 1948 after due investigation came to the conclusion that none of the abolitionist countries were thinking of reintroducing Capital Punishment in their respective Criminal Codes. Following the recommendations of the Royal Commission for its abolition, England was thrown into a long drawn-out debate on this issue. The House of Commons voted to abolish the penalty, but the House of Lords refused. Later, a strange compromise was adopted in which only certain types of murders would be visited with death penalty.³¹

28. Before the deletion of the previous sub-section (5) of section 367 of the Code of Criminal Procedure, by Act XXVI of 1955, the sentence of death was the normal penalty for murder and a lesser sentence could be passed when there was any extenuating circumstance. Now the question of proper sentence when the accused is convicted of an offence punishable with death is to be decided, not on any assumption of that nature, but like any other point for determination with the decision thereon and the reasons for the decision.

29. Friedmann, *Law in a Changing Society* (1959), p. 180.

30. Harry Elmer Barnes and Neglay K. Teeters *New Horizons in Criminology*, 3rd edn., p. 312.

31. In an explanatory memorandum to the Homicide Bill (which later became the Homicide Act, 1957), the two controversial clauses were described as follows :—

The practice of the primitive man of complete blotting out the culprit, should yield place to the faith of the modern man : ' the re-alignment of the client to his proper place in society's pattern'. The importance, significance and the need for a changed outlook in penological methods is slowly being realised in India. A few members of Parliament in 1956-58 and 1961 made eloquent appeals for the abolition of capital punishment.

Looking at the institution of Capital Punishment from this background one arrives at the conclusion that death penalty in this era is wholly unscientific and completely out-dated. In the world of today, with its humanitarianism, increasing impersonality in social relationships and growing belief in the powers of science death penalty has undoubtedly become an unacceptable and ineffective method of punishment and is largely being replaced with imprisonment, in which the emphasis is more and more upon a scientific programme of rehabilitation. It may, as best, be retained as an experimental measure, *mutatis mutandis*, for certain classes of murders only as in U. K.³², apart from inflicting the same on incorrigible offenders and for offences falling under section 121 of the Penal Code.

It has been announced that the Law Commission has been asked to enquire into the question of the abolition of Capital Punishment in India and the results of its investigations are awaited with great interest by every enlightened individual in the country. It is everybody's earnest hope that the Law Commission by its findings would not turn the clock back by a few decades but would recommend abolition of Capital Punishment and thus help reorientation of the principles of substantive Criminal Law of India on the foundations of modern penological thoughts of today.

" Clause 5 preserves the death penalty for murders in the course of furtherance of theft ; murders by shooting or by causing an explosion; murders in the course of resisting arrest or of escaping legal custody, murders of Police Officers; in the execution of their duty and persons assisting them, and murders by prisoners of prison officers, in the execution of their duty and persons assisting them. Sub-section (2) provides that where two or more persons are guilty of such murder it shall be capital murder only in the case of a person who actually kills or inflicts or attempts to inflict serious injuries on the victim, or who uses force on the victim in the course of an attack on him.

Clause 6 (1) preserves the death penalty where a person convicted of murder has previously been convicted of another murder done on a different occasion and both murders done in Great Britain.

Clause 6 (2) enables two or more murders to be charged in the same indictment and (unless separate trials are desirable in the interests of justice) to be tried together ; where a person is convicted of two murders tried together, but done on different occasions, clause 6 (1) is to apply as if one conviction had preceded the other."

32. Hall Williams in his "*Developments Since the Homicide Act, 1957*" observes that there is a growing resentment at the Act and it has been described as a hopeless attempt at a compromise. He asks whether it is worthwhile continuing the law about capital murder in order to hang on an average 4 persons each year out of an average total of a hundred or more murderers is debatable. One might add that as Prof. Edmond Cahn has said. "a poor legal test of responsibility can aggravate the wrongs of Capital Punishment, but a satisfactory test cannot remove them". Hall Williams further observes that however successful the efforts to provide a satisfactory basis of legal responsibility for murder may have been, particularly in connection with the vexed problems of mental disorder, it cannot be denied that the major part of the difficulty in this regard would probably disappear overnight with the abolition of Capital Punishment. See Tuttle *The Crusade Against Capital Punishment in Great Britain*, (1961), pages 164-165.

[SUPREME COURT]

P. B. Gajendragadkar and
K. C. Das Gupta, JJ.The Workmen of Subong Tea Estate
represented by the Indian Tea Employees'
Union v. The Outgoing Management of
Subong Tea Estate.
C.A. No. 132 of 1963.

2nd December 1963.

*Industrial Disputes Act. (XIV of 1947), sections 25-F and 25-G—Retrenchment
of the employees.*

It is not disputed that if we hold that the retrenchment ostensibly effected by Mr. Hammond is invalid because the Vendor Company represented by Mr. Hammond had ceased to be the employer then it would follow that the retrenchment must be deemed to have been effected by the vendee and in that case, it is clearly invalid. It is conceded that if the retrenchment is held to be effected by the Vendee, it has not complied with section 25-F or section 25-G of the Act, and there can be little doubt that failure to comply with section 25-F would make the retrenchment invalid, and so would the failure to comply with section 25-G, because no reasons have been recorded by the Vendee for departing from the rule prescribed by section 25-G. In fact, we ought to add that no case has been made out for effecting any retrenchment at all, and as we have already emphasized, the employer's right to retrench his employees can be validly exercised only where it is shown that any employee has become surplus in the undertaking.

That being so, we must hold that the retrenchment of the 8 workmen being invalid in law, cannot be said to have terminated the relationship of employer and employee between the Vendee, respondent No. 2 and the 8 workmen concerned. They are accordingly entitled to reinstatement with continuity of service; they would also be entitled to recover their full wages for the period between the date of the retrenchment and the date of their reinstatement. In this connection, it has been brought to our notice that these 8 employees have been paid their retrenchment compensation. The only direction we can make in that behalf is that when the Vendee reinstates the said employees and pays them their back wages, appropriate adjustments should be made taking into account the amount of retrenchment compensation received by each one of them.

D. L. Sen Gupta and Janardhan Sharma, Advocate, for Appellants.
Sankar Bannerjee, Senior Advocate (S. N. Mukherjee and B. N. Ghosh, Advocates, with him), for Respondent No. 1.

A. V. Viswanatha Sastri, Senior Advocate (B. P. Maheshwari and P. R. Ghosh, Advocates, with him), for Respondent No. 2.

G.R.

Appeal allowed.

[SUPREME COURT]

P. B. Gajendragadkar, K. N. Wanchoo, and
K. C. Das Gupta, JJ.
2nd December, 1963.South Indian Bank, Ltd. v.
A. R. Chacko.
C.A. No. 178 of 1963.

*Industrial Disputes Act (XIV of 1947), section 33-C (2)—Industrial Disputes
(Banking Companies) Decision Act (1955).*

The first objection raised by the Bank is now concluded by the decision of this Court in *The Central Bank of India v. P. S. Rajagopalan*, C.A. Nos. 823 to 826 of 1962 decided on 19th April, 1963 where it has been held that such an application by workmen lies under section 33-C (2) of the Act.

It is pertinent to notice that on the Bank's case a workman in the position of Chacko would on promotion to the rank of an officer from that of a workman be financially a loser by being deprived of the special allowance which he would have got as a workman with supervisory duties without obtaining sufficient recompense for the same because of the performance of the so-called managerial and administrative duties. It is not unreasonable to think that this so-called promotion to officer's grade was really intended to undo the effect of the recommendations of the Sastry

Award for this supervisory allowance. It is difficult to understand otherwise that persons with higher responsibilities and managerial duties to perform would in fact be getting less in rupees and annas than what they would be getting as workmen. In the circumstances, the finding of the Labour Court that the respondent was a workman entitled to the benefits of the Sastry Award cannot be successfully challenged.

M. C. Setaivad, Senior Advocate (*J. N. Hazarika* and *K. P. Gupta*, Advocates, with him), for Appellant.

M. K. Ramamurthi, *R. K. Garg*, *S. C. Agarwal* and *D. P. Singh*, Advocates of *M/s. Ramamurthi & Co.*, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT]

K. Subba Rao, *M. Hidayatullah* and
J. C. Shah, JJ.

Monimala Devi v.
Indu Bala Debya.

3rd December, 1963.

C.A. No. 560 of 1960.

Limitation Act (IX of 1908), section 20 and Articles 116, 120 and 132—Transfer of Property Act (IV of 1882), section 68 (1) (d).

The High Court of Madras was right in holding in *Pavayi v. Palamiyela Goudan*, I.L.R. (1940) Mad. 872: (1940) 1 M.L.J. 766, that a mortgagor who has lost all interest in the mortgaged property cannot by payment of interest or principal within the meaning of section 20 bind the person on whom the interest has devolved. But the mortgagor's interest in *Mauza Bahaldih* subsisted on the date of payment by him of Rs. 100 towards the principal and interest, and such payment having been made within twelve years from 14th April 1925, the plaintiff's claim to enforce the mortgage, dated 27th August, 1922, was at the date of the suit not barred by limitation.

A suit for enforcement of the personal covenant to pay the mortgage money when mortgagor has bound himself to repay the same is governed by Article 116 of the Limitation Act. Similarly the right to sue where the mortgagee is deprived of the mortgage security or where he is not secured in his possession of the mortgaged property or where possession is not delivered to him as agreed, the claim maintainable by the mortgagee is one for compensation and the period of limitation for a suit to recover the mortgage money is governed by Article 120 of the Limitation Act from the date of destruction or deprivation of the mortgage security possession and not from the date when the mortgage money is repayable: *Unichaman v. Ahmed*, I.L.R. 21 Mad. 242: 8 M.L.J. 81.

S. C. Agarwal and *D. P. Singh*, Advocates of *M/s. Ramamurthi & Co.*, Advocates, for Appellant.

P. K. Ghosh, Advocate, for Respondent No. 1.

G.R.

Appeal partly allowed.

[SUPREME COURT]

P. B. Gajendragadkar, *K. Subba Rao*,
K. N. Wanchoo and
N. Rajagopala Ayyangar, JJ.
3rd December, 1963.

Virdhachalam Pillai v.
Chaldean Syrian Bank, Ltd. Trichur.
C.A. No. 547 of 1961.

Hindu Law—Son's liability for the payment of father's debt—Scope of pious obligation.

In the view of Hindu lawyers the repayment of a debt was conceived of not merely as a legal obligation which had been undertaken when the debt was incurred but non-repayment was considered a sin. The duty of relieving the debtor from this sin was fastened on his male descendants to the third degree. The duty being thus religious, it was held not attracted if in its nature it was illegal, or immoral, *i.e.*, *avyavaharika*. Whatever might have been the extent of the son's liability according to the Hindu law-givers, under the Mitakshara law as administered in all the States, the liability of the son, grandson, great grandson etc., was not treated as a personal liability but as dependent on his becoming entitled to family assets and that it extended to the entirety of his interest therein but no more.

T. N. Subramania Iyer, Senior Advocate (*M. S. Narasimhan* and *M. S. K. Sastri*, Advocates, with him), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (*T. S. Venkateswara Iyer*, *K. Jayaram* and *R. Ganapathi Iyer*, Advocates, with him), for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT]

P. B. Gajendragadkar,
R. N. Wanchoo, and
K. C. Das Gupta, JJ.
3rd December, 1963.

The Associated Cement Staff Union v.
The Associated Cement Co., Ltd., Bombay.
C. As. Nos. 1 to 5 of 1963.

Industrial Disputes Act (XIV of 1947), section 9 (a)—Applicability of principles of res judicata—Working hours—Number of holidays.

It is true that too frequent alterations of conditions of service by industrial adjudication have been generally deprecated by this Court for the reason that it is likely to disturb industrial peace and equilibrium. At the same time the Court has more than once pointed out the importance of remembering the dynamic nature of industrial relations. That is why the Court has, specially in the more recent decisions, refused to apply to industrial adjudications principles of *res judicata* that are meant and suited for ordinary civil litigations. Even where conditions of service have been changed only a few years before industrial adjudication has allowed fresh changes if convinced of the necessity and justification of these by the existing conditions and circumstances. Where, as in the present case, in a previous Reference the Tribunal had refused the demand for change, there is even less reason for saying that that refusal should have any such binding effect. It is important to remember in this connection that working hours remained unchanged for many years in this concern and during these years, considerable changes have taken place in the country's economic position and expectations. With the growing realisation of need for better distribution of national wealth has also come an understanding of the need for increase in production as an essential pre-requisite of which greater efforts on the part of the labour force are necessary. That itself is sufficient reason against accepting the argument against any change in working hours if found justified on relevant considerations that have been indicated above. We are satisfied that in arriving at the figure of 36 working hours in a week the Tribunal has given proper weight to all relevant considerations.

It may also be mentioned that in *Pfizer Ltd.'s case*, (1963) L.I.J. (Vol. 1) 543, this Court has fixed 16 as the number of holidays for the workmen. We see no reason why in the present case also that standard should not be followed.

We therefore allow the Company's appeal (C.A. No. 3 of 1963) on the question of holidays and fix the number of holidays at 16 instead of 21 as awarded and dismiss the workmen's appeal (C.A. No. 2 of 1963) on the question of holidays. This award of 16 holidays in a year will come into effect from the year 1964. There will be no order as to costs.

Madan G. Phadnis, Advocate and *M. K. Ramamurthi*, *R. K. Garg*, *S. Agarwal* and *D. P. Singh*, Advocates of *M/s. Ramamurthi & Co.*, for Appellants. (In C.A. Nos. 1 and 2 of 1963) and for Respondents in C.A. Nos. 3 to 5 of 1963.

M. C. Setalvad, Senior Advocate (*J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondents in C.A. Nos. 1 and 2 of 1963 and Appellants in C.A. Nos. 3 to 5 of 1963.

G.R.

Company's appeal allowed. Workmen's appeal dismissed.

[SUPREME COURT]

A. K. Sarkar and
K. N. Wanchoo, JJ.
6th December, 1963.

State of Gujarat v.
Jethalal Ghelabhai Patel.
Cr. A. No. 193 of 1961.

Factories Act (LXIII of 1948), sections 21 (1) (iv) (c) and 92.

No doubt the default on the part of the person accused has to be established by the prosecution before there can be a conviction. It has to be observed that

section 21 (1) (iv) (c) requires not only that the dangerous part of a machine shall be securely fenced by safeguards but also that the safeguards "shall be kept in position while the parts of the machinery they are fencing are in motion or in use". We should have thought that the words "shall be securely fenced" suggested that the fencing should always be there. The statute has however put the matter beyond doubt by expressly saying that the fencing shall be kept in position while the machine is working. That is the default that has happened here; the fencing was not there when the machine had been made to work. This is an admitted fact and no question of establishing its arises.

It seems to us clear that if it was his duty to exercise due diligence for the purpose in a case where he could establish that somebody else had removed the fence, it would be equally his duty to exercise that diligence where he could not prove who had removed it. If it were not so, the intention of the Act to give protection to workmen would be wholly defeated.

D. R. Prem, K. L. Hathi and R. H. Debhar, Advocates, for Appellant.

G.R.

Appeal allowed.

[SUPREME COURT]

K. Subba Rao, M. Hidayatullah and

J. C. Shah, JJ.

6th December, 1963.

C. Beepathumma v.

Volasari Shankaranarayana Kadambolithaya.

C.A. No. 446 of 1960.

- Limitation Act (IX of 1908), Article 148—Equity of redemption.

Now the mortgagees cannot claim to hold the lands and use the amount paid as price of redemption. Even if they were not required to hand over possession till the amount together with the compensation for improvements was paid in full to them, they could not have the use of the money as well. In our opinion, the mortgagees must pay interest on the amount paid by the mortgagors from the date of withdrawal of the amount till possession was delivered to the mortgagors at 6% per annum simple. The extra amount due to the mortgagees by way of compensation will be deductible and accounts shall be adjusted between the parties accordingly.

S. T. Desai, Senior Advocate (M. S. Narasimhan and M. S. Sastri, Advocates with him), for Appellants.

C. B. Agarwala, Senior Advocate, K. Jayaram and R. Ganapathy Iyer, Advocates, with him), for Respondents.

G.R.

Appeal partly allowed.

[SUPREME COURT]

P. B. Gajendragadkar and

K. C. Das Gupta, JJ.

6th December, 1963.

Industrial Dispute—Bonus.

Burn & Co., Ltd. v.

Their Workmen.

C. As. Nos. 97-99 of 1963.

We see no reason also to disturb the Tribunal's findings that the rate of 7% on preference shares being a contractual one should not be diminished and that an increase of 30% was also allowable under section 3 (1) of the Preference Shares (Regulation of Dividends) Act of 1960. We are of opinion that the Tribunal was also right in holding that such an increase was not admissible in respect of the ordinary shares.

The award of bonus at 5½ months' wages appears to be reasonable and proper on this figure of the available surplus. The employers' plea for reduction of the bonus and workmen's claim for increase of it appear to us equally unjustified.

A. V. Viswamanatha Sastri and B. Sen, Senior Advocates (D. N. Mukherjee, Advocate, with them), for Appellant in C.A. No. 97 of 1963 and for Respondent No. 1 in C.A. Nos. 98 and 99 of 1963.

H. N. Sanyal, Solicitor-General of India, (B.P. Maheshwari, Advocate with him), for Appellant (in C.A. No. 99 of 1963).

D. L. Sen Gupta and *B. P. Maheswari*, Advocates for Appellant in C.A. No. 98 of 1963 and for Respondent No. 3 in C.A. No. 97 of 1963.

Dipak Datta Chauduri, Advocate, for Respondent No. 1 in C.A. No. 97 of 1963.

N. C. Chatterjee, Senior Advocate (*Ajit Roy Mukherjee* and *A. K. Nag*, Advocates, with him), for Respondent No. 4 in C.A. Nos. 97 and 98 of 1963.

G.R.

Appeals dismissed.

[SUPREME COURT]

K. Subba Rao, Raghubar Dayal and
J. R. Mudholkar, JJ.
6th December. 1963.

Bai Achhuba Amarsingh v.
Kalidas Harnath Ojha.
C.A. No. 397 of 1962.

Bombay Tenancy and Agricultural Lands Act, 1948 as amended in 1956, section 84-A—Scope of—If prospective or retrospective.

By Majority.—We are further of the view that the provisions of section 84-A are prospective in their application. A bare perusal of the provisions of section 84-A would show that what that section does is to impose an embargo upon the making of a declaration that a transfer is invalid on the ground that it was made in contravention of the provision of sections 63 and 64. Its operation is thus prospective in the sense that it bars making of any declaration or a finding that a transfer is invalid after it came into force. It does not affect any adjudication in which a transfer had already been held to be invalid. Thus it can possibly have no application to a case like the present wherein a declaration or a finding as to invalidity had already been made by the Collector and was followed by an order of eviction, albeit conditional. The mamlatdar, therefore, had no jurisdiction to issue the certificate in question to the respondent. That being the position we must hold that the High Court was in error in setting aside the order of the Revenue Tribunal upholding that of the Collector. We, therefore, set aside the order of the High Court and restore that of the Revenue Tribunal. Costs throughout will be borne by the Respondent No. 1.

M. V. Goswami, Advocate, for Appellant.

G. B. Pai, Advocate and *O. C. Mathur*, Advocate of *M/s. J.B. Dadachanji & Co.*, for Respondent No. 1.

K. L. Hathi, Advocate, for *R. H. Dhebar*, Advocate for Respondent No. 2.

G.R.

Appeal allowed.

[SUPREME COURT]

P. B. Gajendragadkar and
K. C. Das Gupta, JJ.
9th December, 1963.

Sri Rama Vilas Service (P.) Ltd. v.
C. Chandrasekaran.
C. A. No. 1015 of 1963.

Motor Vehicles Act (IV of 1939), section 47 (1)—Who is a monopolist.

There can be no doubt that in granting a permit the appropriate authorities under the Motor Vehicles Act are required to consider the interests of the public generally under section 47 (1) (a), and in assessing the merits of an individual applicant for a permit on any route, it would be open to the appropriate authority to enquire whether the service which the individual applicant would render to the public if he is given a permit would be efficient and satisfactory or not. In dealing with this aspect of the matter, it would not be irrelevant for the appropriate authority to hold that if any applicant is or would be in the position of a monopolist if a permit was granted to him, he would be liable if he neglects the interests of the public and may not be very keen on taking all steps to keep his service in good and efficient order. Absence of any competition from another bus-operator on the route is likely to develop a feeling of complacency in the monopolist and that is a factor which the appropriate authority can certainly take into account. Therefore, it cannot be urged that in taking into account the fact that the appellant was a monopolist on a part of the route, the Appellate Tribunal has been influenced by any irrelevant fact. *vide R. K. Ayyaswami Gounder v. M/s. Soudambigai Motor Service, Dharampura and others*, C.A. No. 198 of 1962, decided on 17th September, 1962.

In entertaining writ petitions, the High Court must not lose sight of the fact that decisions of questions of fact under the Motor Vehicles Act have been left to the appropriate authorities which have been constituted into quasi-judicial Tribunals in that behalf, and so, decisions rendered by them on questions of fact should not be interfered with under the special jurisdiction conferred on the High Courts under Article 226, unless the well recognised tests in that behalf are satisfied. In the present case we have no doubt that the Division Bench was right in holding that Srinivasan, J., should not have issued a writ in favour of the appellant.

G. S. Pathak, Senior Advocate (*K. K. Venugopal* and *R. Gopalakrishnan*, Advocates, with him) for Appellant.

M. C. Setalvad, Senior Advocate *B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT]

B. P. Sinha, C.J., *Raghubar Dayal*,
N. Rajagopala Ayyangar and
J. R. Mudholkar, JJ.
10th December, 1963.

The Bhusawal Borough Municipality v.
The Amalgamated Electricity Co., Ltd.
C. As. Nos. 47-48 of 1961.

Civil Procedure Code (V of 1908), Order 41, rule 27—Misconstruction of a document and error of law—Omission to produce document.

There is no reason to think that what is on the face of it a decision is nothing but an opinion because if there were anything in the correspondence to which a reference is made in that letter as well as in the endorsement at the bottom which went to show that the appellant did not purport to refer any dispute to the Government it was for the appellant to produce that correspondence. Its omission to do so must be construed against it. Then Mr. Pathak said that under the Surcharge Order itself the dispute had to be referred by both the parties and not by only one of them. This contention is, however, untenable in view of the clear language of the Proviso which says : "in the event of dispute by any party interested" the decision of the Provincial Government shall be final. There is, therefore, no substance in the contention. In our opinion the trial Court and the District Court had wholly misconstrued this document which is not merely of evidentiary value but is one upon which the claim of the Respondent No. 1 for the surcharge is based. Misconstruction of such document would thus be an error of law and the High Court in Second Appeal would be entitled to correct it.

G. S. Pathak, Senior Advocate (*Naumit Lal*, Advocate, with him), for Appellant.
I. N. Shroff, Advocate, for Respondent No. 1.

M. S. K. Sastri and *R. H. Dhebar*, Advocates, for Respondent No. 2.

G.R.

Appeals dismissed.

[SUPREME COURT]

P. B. Gajendragadkar and
K. C. Das Gupta, JJ.
- 11th December, 1963.

V. R. Sadagopa Naidu v.
Bakthavatsalam.
C.A. No. 316 of 1959.

Hindu Marriages Validity Act (XXI of 1949)—Hindu Widows Remarriage Act (XV of 1856)—Issue of marriage—Right to joint family properties.

In our opinion, the use of the words "the issue of no such marriage shall be illegitimate" was not really necessary in section 1 of the Hindu Widows Remarriage Act, and even without these words the effect of a marriage being valid would necessarily have been that the issue of the marriage was legitimate. These words were put in the section by the Legislature in 1856 as a matter of abundant caution. The absence of such words in the Hindu Marriages Validity Act, 1949 is of no consequence. If the Act had not retrospectively validated marriages celebrated before the date of the Act, the children of those marriages could not have claimed to be legitimate. The Act was however in terms retrospective and validated marriages that had taken place before the Act between parties belonging to different castes,

sub-castes and sects. It is idle to contend that the object of the Legislature was only to regularise the status of the husband and the wife. That certainly was part of the object. But equally important or perhaps more important object was that the children of the marriages would become legitimate.

We have therefore come to the conclusion that even if the Trial Court was right in thinking that Padmavathi was a Brahmin girl and not a Shudra the position in law was, as found by the Courts below *viz.*, it was a valid Hindu marriage and Bhakthavatsalam a legitimate son of Sadagopa with all the rights of a coparcener in regard to the joint family properties and other matters.

G. S. Pathak, Senior Advocate (B. Dutta and T. R. Ramachandra, Advocates and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellants.

H. N. Sanyal, Solicitor-General of India (K. Jayaram and R. Ganapathy Iyer, Advocates, with him), for Respondent No. 1.

N. Panchapagesa Iyer, M.P. Swami and R. Thiagarajan, Advocates, for Respondent No. 2.

G.R.

Appeal dismissed.

[SUPREME COURT]

B. P. Sinha, C.J., K. N. Wanchoo,
Raghubar Dayal, N. Rajagopala Ayyangar, and
J. R. Mudholkar, JJ.
12th December, 1963.

Ram Sarup v.
The Union of India.
Petition No. 166 of 1963.

Army Act (XLVI of 1950), section 125—Vires—General Court Martial under section 69 of the Army Act read with section 302, I. P. Code—Writs of habeas corpus and certiorari—Articles 14 and 22 (1) of the Constitution.

It appears that the Central Government itself exercised the power of confirmation of the sentence awarded to the petitioner in the instant case by the General Court Martial. The Central Government is the highest authority mentioned in sub-section (2) of section 164. There could therefore be no occasion for a further appeal to any other body and therefore no justifiable grievance can be made of the fact that the petitioner had no occasion to go to any other authority with a second petition as he could possibly have done in case the order of confirmation was by any authority subordinate to the Central Government. The Act itself provides that the Central Government is to confirm the findings and sentences of General Courts-Martial and therefore could not have contemplated, by the provisions of section 164, that the Central Government could not exercise this power but should always have this power exercised by any other officer which it may empower in that behalf by warrant.

We therefore do not consider this contention to have any force.

The learned Attorney-General has urged that the entire Act has been enacted by Parliament and if any of the provisions of the Act is not consistent with the provisions of any of the Articles in Part III of the Constitution, it must be taken that to the extent of the inconsistency Parliament had modified the fundamental rights under those Articles in their application to the person subject to that Act. Any such provision in the Act is as much law as the entire Act. We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to affect the fundamental right under Part III of the Constitution, that provision does not on that account, become void, as it must be taken that Parliament has thereby, in the exercise of its power under Article 33 of the Constitution, made the requisite modification to affect the respective fundamental right. We are however of opinion that the provisions of section 125 of the Act are not discriminatory and do not infringe the provisions of Article 14 of the Constitution.

It is clear therefore that the discretion to be exercised by the military officer specified in section 125 of the Act as to the trial of accused by Court-Martial or by

an ordinary Court, cannot be said to be unguided by any policy laid down by the Act or uncontrolled by any other authority. Section 125 of the Act therefore cannot, even on merits, be said to infringe the provisions of Article 14 of the Constitution.

O. P. Rana, Advocate (*amicus curiae*) (Petitioner was also produced and present), for Petitioner.

C. K. Dephtary, Attorney-General of India (*B. R. L. Iyengar* and *R. H. Dhebar*, Advocates, with him), for Respondents.

G.R.

Petition dismissed.

[SUPREME COURT]

B. P. Sinha, C.J., A. K. Sarkar and

Arjun Singh v.

N. Rajagopala Ayyangar, JJ.

Mohindra Kumar.

13th December, 1963.

C.A. No. 768 of 1963.

Civil Procedure Code (V of 1908), sections 11 and 105, Order 9, Rules 7 and 13—Order 17, rule 3—Res judicata.

So far as the case before us is concerned the order under appeal cannot be sustained even on the basis that the finding recorded in disposing of an application under Order 9, rule 7, would operate as *res judicata* when the same question of fact is raised in a subsequent application to set aside an *ex parte* decree under Order 9, rule 13.

Learned Counsel was unable to point out any flaw in the facts here stated. It would, therefore, follow that the terms of Order 17, rule 3, were not attracted at all and that Suit No. 134 of 1956 was decreed not on merits but really *ex parte* as had been expressly stated by the learned Civil Judge when he passed that decree.

In the result, the appeal is allowed and the application filed by the appellant under Order 9, rule 13, for setting aside the *ex parte* decree passed in Suit No. 134 of 1956, is remanded to the trial Judge for disposal on the merits in accordance with law. The appellant will be entitled to his costs throughout. The cost incurred after this remand will be provided for by the Courts below.

M. C. Setalvad, Senior Advocate (*Y. Talwar* and *J. P. Goyal*, Advocate with him), for Appellant.

G. S. Pathak, Senior Advocate, (*R. S. Agarwala* and *B. Datta*, Advocates and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondents.

G.R.

Appeal allowed.

[SUPREME COURT]

B. P. Sinha, C.J., K. Subba Rao,

Ramnarayan Mor v.

M. Hidayatullah, J. C. Shah and

State of Maharashtra.

N. Rajagopala Ayyangar, JJ.

Cr. A. No. 164 of 1963.

16th December, 1963.

Criminal Procedure Code (V of 1898), sections 251-A, 173 (4), 207-A (6),—Scope.

By Majority.—The scheme of section 251-A, Criminal Procedure Code, which was brought on the statute book simultaneously with section 207-A by Act (XXVI of 1955), also furnishes an indication that in the examination of the accused for enabling him to explain circumstances appearing in the evidence against him, documents referred to in section 173 (4) cannot be excluded. Section 251-A prescribes a special procedure for warrant cases, instituted upon police reports. In a case started otherwise than on a police report, the old procedure of examining witnesses and framing a charge on which the accused is to be tried continues to apply. But where the proceedings commence on a police report; the Magistrate has under section 251-A (2) to consider the documents referred to in section 173 (4) and then to examine the accused if necessary and to give the accused and the prosecutor opportunity of being heard. Under section 251-A no provision is made for examination of witnesses before making an order under sub-section (2) discharging the accused or under sub-

section (3) framing a charge. Under sub-section (2) of section 251-A the Magistrate may upon consideration of the documents referred to in section 173 (4) and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecutor and the accused an opportunity of being heard, discharge the accused if he considers the charge to be groundless, or frame a charge against him under sub-section (3) if there is ground for presuming that the accused has committed an offence. In a warrant case therefore there will be no evidence of witnesses and the examination of the accused if found necessary by the Magistrate must of necessity be restricted to the circumstances appearing from the documents under section 173 (4). The Legislature has therefore in enquiries in warrant cases contemplated examination of the accused solely upon circumstances appearing from the documentary evidence referred to in section 173 (4) and it cannot be assumed that the examination of the accused in respect of circumstances appearing from those documents which are not proved but of which copies have been furnished to the accused, is so inconsistent with principles of criminal jurisprudence that it must be discountenanced. If opportunity may be given to an accused person before framing a charge under section 251-A (2), to explain circumstances appearing from the documents referred to in section 173 (4), it is difficult to see any ground on which the Magistrate holding an enquiry for commitment may be disentitled to do so under section 207-A (6). It would be somewhat anomalous, if it were true, that in the enquiry before framing a charge against the accused in respect of a charge for an offence which is triable by the Court of Session as well as by a Magistrate, two different rules relating to the examination of the accused would prevail, according as the accused is to be tried by the Court of Session, or by the Magistrate.

We are, therefore, of the view that the Magistrate has the power, if he thinks it necessary, to examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence such evidence being oral evidence, if any, as may have been recorded and the documents referred to in section 173 (4).

A. S. Bobde, Advocate, and *O. C. Mathur*, *J. B. Dadachanji* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Appellants.

M. C. Setalvad, Senior Advocate, *H. R. Khanna* and *R. H. Dhebar*, Advocates, with him, for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT]

A. K. Sarkar, *J. C. Shah* and
Raghubar Dayal, JJ.
16th December, 1963.

R. Ratilal & Co., v.
The National Security Assurance Co., Ltd.
C.A. No. 382 of 1961.

Stamp Act (II of 1899), section 35 and Article 47—Interim Protection Note and its scope.

By Majority.—We think that the present Interim Protection Note satisfies the conditions which would make it a letter of cover in this sense. It gives protection for a period of thirty days or the period upto the date of the issue of the policy. An engagement to issue a policy means, it seems to us, more or less the same thing as a letter of cover. A letter of cover, therefore, cannot be admitted in evidence under section 35 as a policy of insurance.

We have now to state that the appellant had paid the duty and penalty as required by section 35. There is no objection any more to the admissibility of the letter of cover in evidence. The only defence that was taken by the respondent to the claim of the appellant, therefore, fails and the appeal should succeed.

B. K. Bhattacharjee, Senior Advocate, (*D. K. De* and *S. N. Mukherjee*, Advocates, with him), for Appellant.

N. C. Chatterjee, Senior Advocate, (*D. N. Mukherjee*, Advocate, with him), for Respondents.

G.R.

Appeal allowed.

[SUPREME COURT.]

*B. P. Sinha, C.J., A. K. Sarkar,
M. Hidayatullah, K. C. Das Gupta and
N. Rajagopala Ayyangar, JJ.*
16th December, 1963.

*Smt. Shahzad Kunwar v.
Raja Ram Karan Bahadur.*
C.A. No. 350 of 1958.

Religious Endowments—De facto Shebait of a temple—Powers of.

Coming nearer to the present times we find that in 1926 when a question arose about the re-appointment of a constable attached to the temple, the Executive Committee of Raja Dharam Karan was approached and one Mohan Das Brahman was appointed to the post under orders of the Committee. When all these documents are considered together there remains little doubt that Raja Indrajit, after him Raja Sheoraj and thereafter Raja Dharam Karan was looking after the management of the property and making arrangements for the sevapuja of the temple in the way a Shebait would do. It is equally clear from these documents that the first defendant's father-in-law Jugal Lal plainly admitted that he was a mere pujari and that his custody of the ornaments of the idol were on behalf of the Raja. Mention must also be made of the fact that in the very will in which Shahzad Kunwar claims a proprietary interest in the property, adding that she was the Mutwali of the idol, she stated that this temple was known as the temple of Hyderabad. There can be little doubt therefore that the Rajas considered themselves as the Shebait of the idol and managed the property in that capacity and appointed pujaris and others for the sevapuja of the idol and for the proper upkeep of the temple.

Our conclusion, on a consideration of the materials on the record, is that the High Court rightly held Raja Dharam Karan Bahadur to be the Shebait and the defendant Shahzad Kunwar to be only the pujari and was also right in rejecting the defence plea of limitation.

P. K. Chakravarthy and B. C. Misra, Advocates, for Appellants.

K. K. Raizada and A. G. Ratnaparkhi, Advocates, for Respondents Nos. 2, 3 and 6 to 9.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*P. B. Gajendragadkar, K. Subba Rao,
K. N. Wanchoo, J. C. Shah and
Raghubar Dayal, JJ.*
16th December, 1963.

*State of Punjab v.
Rattan Singh.*
C.A. No. 6 of 1962.

Patiala Recovery of State Dues Act, (IV of 2002 B. K.)—Whether the Insolvency Court can, at the hearing of the petition by a creditor for declaring a debtor insolvent, determine the liability of the alleged debtor for the payment of the debt—Provincial Insolvency Act (V of 1920).

It is clear from the provisions of the Insolvency Act that it is the duty of the Insolvency Court and therefore clearly within its jurisdiction to require proof to its satisfaction of the debts sought to be proved at the stage of the hearing of the insolvency petition or subsequent to the adjudication.

There is plenty of case-law in support of the view that the insolvency Court can go behind the decree of a Court in order to prove the genuineness of the debt in connection with which the decree is passed.

In this case the probe into the judgment debt was made at the time of the adjudication proceedings.

We therefore hold that the head of department had the power to decide, under section 4 of the Patiala State Dues Act, whether the alleged defaulter was a defaulter or not, that no civil Court can consider this matter in view of section 11 of the Act and that the Insolvency Court is however not precluded from enquiring into the question whether the alleged debtor was really a debtor and liable to pay sums said to be payable by him. The Insolvency Court has found that the respondent had not executed the surety bond and that therefore he could not be liable to make good any payment under it. The order of the Court below in dismissing the insolvency petition is therefore, correct.

S. V. Gupte, Additional Solicitor-General of India, (D. D. Chaudhuri and B. R. G. K. Achar, Advocates, with him), for Appellant.

M. C. Setalvad, Senior Advocate, (S. N. Andley, Rameshwar Nath and P. L. Vehra, Advocates of M/s. Rajinder Narain & Co. with him), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar and

K. C. Das Gupta, JJ.

16th December, 1963.

T. Prem Sagar v.

M/s. Standard Vacuum Oil Company, Madras.

C.As. No. 581-582 of 1963.

Constitution of India (1950), Article 226—*Writ Jurisdiction of the High Court—Writ of certiorari—Scope.*

Referring to its earlier decision in *Parry & Co., Ltd v. Commercial Employees' Association, Madras*, (1952) S.C.R. 519: (1952) S.C.J. 275: (1952) 1 M.L.J. 813 the Court observed: "It may be conceded that the observation made by Mukherjea, J., on which Mr. Venugopal relies does, *prima facie* lend some support to his argument; but we do not think that this observation can be read as laying down a categorical and unqualified proposition that unless an error of jurisdiction is established, or fraud proved, no writ of *certiorari* can be issued."

As was observed by this Court in *Nagendra Nath v. Commissioner of Hills Division*, (1958) S.C.J. 789: (1958) S.C.R. 1240: A.I.R. 1958 S.C. 398 at p. 412, "it is clear from an examination of the authorities of this Court, as also of the Courts in England, that one of the grounds on which the jurisdiction of the High Court on *certiorari* may be invoked, is an error of law apparent on the face of the record and not every error either of law or fact, which can be corrected by a superior Court, in exercise of its statutory powers as a Court of appeal or revision". It is, of course, difficult and indeed it would be inexpedient to lay down any general test to determine which errors of law can be described as errors of law apparent on the face of the record, vide *Syed Yakoob v. K. S. Radhakrishnan and others*, A.I.R. 1964 S.C. 477. In our opinion, if the Commissioner's order is shown to suffer from the infirmity of an error of law apparent on face of the record, the High Court would be justified in issuing a writ notwithstanding the fact that section 51 of the Act purports to make the Commissioner's order final.

Incidentally, we ought to point out that even if the Division Bench was right in holding that the impugned order should be corrected by the issue of a writ of *certiorari*, it would have been better if it had not made its own findings on the evidence and passed its own order in that behalf. In writ proceedings if an error of law apparent on the face of the record is disclosed and a writ is issued, the usual course to adopt is to correct the error and send the case back to the Special Tribunal for its decision in accordance with law. It would, we think, be inappropriate for the High Court exercising its writ jurisdiction to consider the evidence for itself and reach its own conclusions in matters which have been left by the Legislature to the decisions of specially constituted Tribunals.

K. K. Venugopal and A. G. Ratnaparkhi, Advocates, for Appellant in both appeals.

S. Govind Swaminathan, P. Ram Reddy, A. V. V. Nair and R. Thiagarajan, Advocates, for Respondent No. 1 in both appeals.

G.R.

Appeals allowed.

[SUPREME COURT.]

P. B. Gajendragadkar, K. Subba Rao,

K. N. Wanchoo, N. Rajagopala

Ayyangar and J. R. Mudholkar, JJ.

18th December, 1963.

Kanakarathanammal v.

V. S. Loganatha Mudaliar.

C.A. No. 528 of 1961.

Mysore Hindu Women's Rights Act (X of 1933), section 12, sub-section (i) clause (1)—Order I, Rule 9, Civil Procedure Code (V of 1908).

By Majority: Therefore, we are satisfied that the trial Court was right in coming to the conclusion that even if the property belonged to the appellants' mother,

her failure to implead her brothers who would inherit the property along with her makes the suit incompetent. It is true that this question had not been considered by the High Court, but since it is a pure point of law depending upon the construction of section 10 of the Act, we do not think it necessary to remand the case for that purpose to the High Court. Facts which are necessary to decide the question under section 10 (2) have been found and there is no dispute about them. The only point to decide is, on a fair construction of section 10 (2) (b) and (d) which of the said two clauses takes in the property in question.

It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under section 12 of the Act. That, in fact, is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under Order 1, Rule 9 of the Code of Civil Procedure no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1, Rule 10, sub-rule (2) direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties' plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. If the appellant persisted in proceeding with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake.

K. P. Bhatt and R. Thiagarajan, Advocates, for Appellant.

S. T. Desai, Senior Advocate, (K. Jayaram and R. Ganapathy Iyer, Advocates, with him, for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo and
K. C. Das Gupta, JJ.
19th December, 1963.

Bombay Union of Journalists v.
The State of Bombay.
C.A. No. 497 of 1963.

Industrial Disputes Act (XIV of 1947), section 25-F (c)—When can a writ of mandamus be issued—Conditions precedent for retrenchment.

The object which the Legislature had in mind in making these two conditions obligatory and in constituting them into conditions precedent is obvious. These provisions have to be satisfied before a workman can be retrenched. The hardship resulting from retrenchment has been partially redressed by these two clauses (a) and (b) of section 25-F. and so, there is every justification for making them conditions precedent. The same cannot be said about the requirement as to clause (c). Clause (c) is not intended to protect the interests of the workman as such. It is only intended to give intimation to the appropriate Government about the retrenchment, and that only helps the Government keep itself informed about the conditions of employment in the different industries within its region. There does not appear to be present any compelling consideration which would justify the making of the provision prescribed by clause (c) a condition precedent as in the case of clauses (a) and (b). Therefore, having regard to the object which is intended to be achieved by clauses (a) and (b) as distinguished from the object which clause (c) has in mind, it would not be unreasonable to hold that clause (c), unlike clauses (a) and (b), is not condition precedent.

A writ of *mandamus* could be validly issued in such a case if it was established that it was the duty and the obligation of respondent No. 1 to refer for adjudication an industrial dispute where the employee contends that the retrenchment effected by the employer contravenes the provisions of section 25-F (c). The appropriate Government is not bound to refer an industrial dispute even though one of the points raised in the dispute is in regard to the contravention of a mandatory provision of the Act. Even if the employer retrenches the workman contrary to the provisions of section 25-F (c), it does not follow that a dispute resulting from such retrenchment must necessarily be referred for industrial adjudication. The breach of section 25-F is no doubt a serious matter and normally the appropriate Government would refer a dispute of this kind for industrial adjudication ; but the provision contained in section 10 (1) read with section 12 (5) clearly shows that even where a breach of section 25-F is alleged, the appropriate Government may have to consider the expediency of making a reference and if after considering all the relevant facts, the appropriate Government comes to the conclusion that it would be inexpedient to make the reference, it would be competent to it to refuse to make such a reference. We ought to add that when we are discussing this legal position, we are necessarily assuming that the appropriate Government acts honestly and *bona fide*. If the appropriate Government refuses to make a reference for irrelevant considerations, or on extraneous grounds, or acts *mala fide*, that, of course, would be another matter ; in such a case a party would be entitled to move the High Court for a writ of *mandamus*.

Bishan Narain, Senior Advocate, (J. N. Shroff, Advocate, with him), for Appellant.

H. N. Sanyal, Solicitor-General of India, (V. S. Sawhney and R. H. Dhebar, Advocates, with him), for Respondent No. 1.

S. V. Gupte, Additional Solicitor-General of India, (J. B. Dadachanji, O.C Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Respondent No. 2.*

G.R.

Appeal dismissed.

[SUPREME COURT]

P. B. Gajendragadkar and
K. C. Das Gupta, JJ.
19th December, 1963.

Podar Plastics (P.) Ltd., Bombay v.
The Workmen.
C.A. No. 496 of 1963;

Industrial dispute—Bonus—Ad hoc allowance for rehabilitation.

Distinguishing the present case from that of the case of *South India Millowners' Association*, (1962) 1 L.L.J. 223. the Court held it appears that in that case, the appellant Mills had not adduced relevant evidence about the original price and subsequent depreciation of the machinery prior to its purchase by the appellant, and so, acting on the evidence available on the record, the Tribunal adopted some *ad hoc* basis. No grievance was made about the *ad hoc* basis adopted by the Tribunal ; the only grievance made was against certain observations made by the Tribunal that if the existing machinery is second-hand, it should be rehabilitated only by second-hand machinery, and this Court held that the said observations did not represent the true legal position in the matter. It would, we think, be erroneous to assume that this Court approved of or affirmed the *ad hoc* basis adopted by the Tribunal in that particular case. On what material the said *ad hoc* basis was adopted is not known, and it would, we think, be unreasonable to suggest that if the employer does not adduce sufficient evidence to justify his claim for rehabilitation and the Tribunal is inclined to reject the evidence which has been adduced, the Tribunal must nevertheless award some rehabilitation on a purely hypothetical and imaginary *ad hoc* basis. In such a case all that the Tribunal can do is to safeguard the position of the employer by giving him opportunity to adduce better evidence in future, and that is what the Tribunal has done in the present case.

S. V. Gupte, Additional Solicitor-General of India, (*I. N. Shroff*, Advocate, with him), for the Appellant.

K. R. Chaudhuri, Advocate, for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT]

B. P. Sinha, C.J., K. N. Wanchoo,
Raghubar Dayal,
N. Rajagopala Ayyangar and
J. R. Mudholkar, JJ.
19th December, 1963.

The State of Madhya Pradesh v.
Champalal.
C.As. Nos. 379-383 of 1959.

Bhopal Reclamation and Development of Lands (Eradication of Kans) Act (XIII of 1954)—Madhya Pradesh Reclamation of Lands (Extension to Bhopal) Act, 1957—Articles 14, 19 (1) (f) and 31 (2) of the Constitution.

We consider, therefore, that section 4 (1) read in conjunction with the power contained in section 4 (4) coupled with the absence of any provision for entertaining objections would, in the circumstances of there being admittedly patches of land in the same tehsil which had been cleared at least in 1941 must be characterised as arbitrary and imposing an unreasonable restriction on the right to hold and enjoy property within Article 19 (1) (f). The operation of the several sub-sections of section 6 to which we shall immediately make reference reinforces our conclusion as regards the unconstitutionality of the provisions of section 4 (1) read with section 4 (4). Under section 6 (1) (b) immediately on the issue of a notification under section 4 (1) the Reclamation Officer is empowered to take possession of the whole or any part of "the kans area" and "carry on eradicating and other ancillary and subsidiary operations therein".

When by deprivation of possession he is prevented from making any income from the land, the exemption from payment of land revenue, offers him no compensation, only it alleviates his loss. In this view it is unnecessary for us to consider the question whether under Article 31 (2) as it stood at the relevant date, the compensation even if provided need be adequate and how far the adequacy could be justiciable. We have, therefore, no hesitation in saying that section 4 (1) read with section 6 (1) (b) is unconstitutional as violative of Article 31 (2).

B. Sen, Senior Advocate, (*I. N. Shroff*, Advocate, with him), for Appellants (in all the appeals).

M. C. Setalvad, Senior Advocate, (*M. S. Gupta*, Advocate, with him), for Respondents (in C.A. No. 380 of 1959.)

K. K. Jain, Advocate, for Respondents (in C.A. Nos. 381 to 383 of 1959).

G.R.

Appeals dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, A. K. Sarkar,
K. N. Wanchoo, K. C. Das Gupta and
N. Rajagopala Ayyangar, JJ.
20th December, 1963.

Jabar Singh v.
Genda Lal.
C.A. No. 1042 of 1963.

Representation of People Act (XLIII of 1951), sections 97, 100 and 101—Statutory Rules.

It is true that section 101 (a) requires the Tribunal to find the petitioner or such other candidate for the declaration of whose election a prayer is made in the election petition has in fact received a majority of the valid votes. It is urged by Mr. Kapur that the Tribunal cannot make a finding that the alternative candidate has in fact received a majority of the valid votes unless all the votes cast at the election are scrutinised and counted. In our opinion, this contention is not well-founded. We have already noticed that as a result of Rule 57, the Election Tribunal will have to

assume that every ballot paper which had not been rejected under rule 56 constituted one valid vote and it is on that basis that the finding will have to be made under section 101 (a). Section 97 (1) undoubtedly gives an opportunity to the returned candidate to dispute the validity of any of the votes cast in favour of the alternative candidate or to plead for the validity of any vote cast in his favour which has been rejected : but if by his failure to make recrimination within time as required by section 97 the returned candidate is precluded from raising any such plea at the hearing of the election petition, there would be nothing wrong if the Tribunal proceeds to deal with the dispute under section 101 (a) on the basis that the other votes counted by the returning officer were valid votes and that votes in favour of the returned candidate, if any which were rejected, were invalid. What we have said about the presumed validity of the votes in dealing with a petition under section 101 (a) is equally true in dealing with the matter under section 100 (1) (d) (iii). We are, therefore, satisfied that even in cases to which section 97 applies, the enquiry necessary while dealing with the dispute under section 101 (c) will not be wider if the returned candidate has failed to recriminate.

We are, therefore, satisfied that the High Court was right in coming to the conclusion that the Tribunal was in error in holding that "It was an authority charged with the duty of investigating the validity of votes for and against the petitioning and returned candidate or for a matter of that any other contesting candidate".

S. K. Kapur, Senior Advocate. (B. L. Khanma and B. N. Kripal, Advocates, with him), for Appellant.

Homi Daji, Advocate, and R. K. Garg, S. C. Agarwal, M. K. Ramamurthi and D. P. Singh, Advocates of M/s. Ramamurthi & Co., for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

B. P. Sinha C.J., K. Subba Rao,
Raghubar Dayal, N. Rajagopala Ayyangar
and J. R. Mudholkar, JJ.
20th December, 1963.

Vidyacharan Shukla v.
Khubchand Baghel.
C.A. No. 815 of 1963.

Representation of People Act (XLIII of 1951), section 116-A (3)—Limitation Act (IX of 1908), sections 3 to 25 and 29 (2).

The only question, therefore, is whether for the purpose of computing the period of 30 days prescribed under section 116-A (3) of the Representation of the People Act the provisions of section 12 of the Limitation Act can be invoked.

It is possible, however, to construe the reference to section 3 in section 29 (2) of the Limitation Act to mean that the power to dismiss the suit, appeal, etc. if filed beyond the time prescribed, is subject to the modes of computation, etc., of the time prescribed by applying the provisions of sections 4 to 25 which are referred to in the opening words of section 3. On this construction where a case satisfies the opening words of section 29 (2) the entire group of sections 3 to 25 would be attracted to determine the period of limitation prescribed by the special or local law. Now let us test this with reference to the second limb of section 29 (2) treating the latter as a separate and independent provision. That part starts with the words "for determining any period of limitation prescribed for any suit, appeal or application by any special or local law". The words being perfectly general, would manifestly be comprehensive to include every special or local law and among these must necessarily be included such special or local laws which satisfy the conditions specified by the first limb of section 29 (2). We then have this strange result that by the operation of the first part sections 3 to 25 of the Limitation Act are made applicable to that class of special and local laws which satisfy the conditions specified by the first limb whereas by the operation of the second limb the provisions of sections 3, 5, 6 to 8 and 19 to 21 and 23 to 25 would not apply to the same class of cases. A construction which would lead to this anomalous result cannot be accepted and we, therefore, hold that subject to the construction we have put upon sub-section (2) of section 29 both the parts

are to be read as one whole and that the words following the conjunction 'and' "for the purpose of determining any period of limitation", etc., attract the conditions laid down by the opening words of the sub-section.

G. S. Pathak, Senior Advocate, (B. A. Musodkar, Advocate, S. N. Andley, and Rameshwar Nath, Advocates of M/s. Rajinder Narain & Co. with him), for Appellant.

M. S. Gupta, Advocate, for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, K. N. Wanchoo,
K. C. Das Gupta, J. C. Shah and
N. Rajagopala Ayyangar, JJ.
17th January, 1964.

Ram Sewak Yadav v.
Hussain Kamil Kidwai.
C.A. No. 1064 of 1963.

Representation of People Act (XLI of 1951), sections 90 (1), 93, 100 (1) (d) (iii), 101 and 102—Order 11 of the Civil Procedure Code (V of 1908).

We do not think that *Bhim Sen v. Gopali and others*, 22 E.L.R. 288 lays down any general principle that a party is entitled without making allegations of material facts in support of his plea to set aside an election, to claim an order for inspection of the ballot papers and seek to supply the lacuna in his petition by showing that if all the votes are scrutinized again by the Tribunal it may appear that there had been improper reception, refusal or rejection of votes at the time of counting. To support his claim for setting aside the election the petitioner has to make precise allegations of material facts which having regard to the elaborate rules are or must be deemed to be within his knowledge. The nature of the allegations must of course depend upon the facts of each case. But if material facts are not stated, he cannot be permitted to make out a case by fishing out the evidence from an inspection of the ballot papers. In *Bhim Sen's case* the Court was primarily concerned with the question whether amendment of the petition to set aside an election should be granted. It was alleged by the defeated candidate that there had been contravention of the provisions of section 63 (1) of the Act by the Returning Officer and the election was materially affected on that account. The applicant had stated that he believed that the respondents had received many votes which were void. When the ballot box was opened it was found that among the votes credited to the successful candidate were 37 votes which were void. Thereafter, the applicant applied to substitute the words "alleges" for "believes" and "did" for "could". In that case the Court was not concerned to decide whether the order for inspection was properly made. The propriety of the order granting inspection does not appear to have ever been questioned. The principal question raised in the appeal was whether the amendment of the petition should, in the circumstances, be granted and the observation of the Court that "definite particulars about the number and nature of the void votes that had been counted could only be supplied after inspection of the ballot papers" was not intended to be a general statement of the law that whenever an allegation is made in a petition to set aside an election that void votes have been included in the counting of votes received by a successful candidate, definite particulars with regard to the said void votes may only be supplied after the ballot papers are inspected, and that a defeated candidate may claim inspection of the ballot papers without making any specific allegations of material facts and without disclosing a *prima facie* case in support of the claim made.

N. C. Chatterjee, Senior Advocate, (J. P. Goyal, Advocate, with him), for Appellant.

S. P. Sinha, Senior Advocate, (S. Shaikat Hussain, Advocate, with him), for Respondent No. 1.

G.R.

Appeal allowed.

THE SUPREME COURT OF INDIA.

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

The Life Insurance Corporation of India

.. Appellant*

v.

The Commissioner of Income-tax, Delhi and Rajasthan

.. Respondent.

Income-tax Act, (XI of 1922), section 10 (7) and Schedule, Rules 2 (b) and 3 (b).—Life Insurance Company—Income-tax—Basis of assessment—Annual average of surplus on actuarial valuation amounts credited to Investment Reserve Fund to meet depreciation in value of securities—Income-tax Officer, whether empowered to make adjustments on the ground of under-valuation of securities—Provision in the Schedule whether exhaustive.

For the assessment years 1952-53 to 1954-55, the assessment on the assessee-company carrying on life insurance business was made on the basis of the company's annual average of the surplus as found on actuarial valuation in the last intervalation period of four years ending on 31st December, 1951 and accepted by the Controller of Insurance. The Insurance Company is required under the statute to maintain an insurance fund sufficient to cover its liabilities in investments and depreciation in the value of the investments must be specially provided for by making other investments which are kept in the investment reserve fund. The assessee had debited a sum of Rs. 18,75,000 in the consolidated revenue account from January, 1948 to December, 1951 and transferred the same to the investment reserve fund to meet an alleged depreciation in the value of the securities. The Income-tax Officer compared the book value of the stock and shares and the market values of the same and found that the company had undervalued certain shares and securities by Rs. 1,58,756 in the aggregate and increased the investment reserve fund by a sum of Rs. 30,420 which, according to the Officer, was not required. The Officer disallowed Rs. 1,75,000 from the total amount of Rs. 1,86,186 and added to it the surplus for assessment to income-tax. On appeal, the Appellate Assistant Commissioner made further adjustments in the figures. Both the Department and the assessee filed appeals to the Tribunal. The Tribunal set aside the adjustments on the ground they were made without consulting the Controller of Insurance, and modified the assessment. On Reference, the High Court answered the same against the assessee holding that the Officer was competent to make the adjustments. On further appeal to the Supreme Court,

Held : In computing the profits and gains of Life Insurance Company under rule 2 (b) of the Schedule to the Income-tax Act, the Officer had to accept the annual average of the surplus disclosed by the actuarial valuation made in accordance with the Insurance Act. He is empowered, in arriving at the average mentioned in the rule, to exclude any surplus or deficit included in the actuarial valuation in respect of an earlier intervalation period and also expenditure other than an expenditure which may under section 10 of the Act be allowed. Under the rule, the Officer has no power to change the figure in the accounts of the assessee.

Rule 3 of the Schedule makes it obligatory on the Officer to make the computation of the surplus for the purposes of rule 2 according to the scheme provided in rule 3. The first part of rule 3 (b) lays down that it shall be obligatory on the Officer to allow certain amounts written-off or reserved by the assessee as a deduction and to include in the surplus any sums for which credit has been taken on account of appreciation or gains on the realization of the securities or assets. This part of the rule only compels the officer to allow certain amounts for which credit has been taken in the accounts of the assessee. It does not warrant adjustments of accounts on the basis of revaluation made by the Officer. No other provision in the Schedule to the Act relates to the adjustments to be made in the actuarial valuation.

If the Officer doubts the accounts of the assessee, and finds that the rate of interest or other factor employed in determining the liability in respect of outstanding policies is materially inconsistent with the valuation of the securities and other assets so as to artificially reduce the surplus, then he would have the power to make certain adjustments after consultation with the Controller of Insurance. If the adjustments were sought to be made on the ground of under-valuation of the securities, the proviso to rule 3 (b) is not applicable.

The assessments of the profits of the insurance company is completely governed by the rules in the Schedule and there is no power to do anything not contained in it. There is no general power to correct the errors in the accounts of an insurance company.

Appeals from the Judgment, dated 2nd March, 1960 of the Punjab High Court (Circuit Bench) at Delhi in Income-tax Civil Reference No. 6-D of 1957.

M. C. Setalvad and Bishan Narain, Senior Advocates (*R. J. Kolah and K. L. Hathji*, Advocates, with them), for Appellant.

Gopal Singh and R. N. Sachthey, Advocates, for Respondent.

The Court delivered the following Judgments :

Sarkar, J. (for himself and *Shah, J.*).—We think that these appeals should be allowed.

The appeals relate to the assessment to income-tax of the income of the life insurance business of the Bharat Insurance Co., Ltd., now merged in the Life Insurance Corporation, Ltd. The assessment years concerned are 1952-53, 1953-54 and 1954-55. The Income-tax Act, 1922 makes special provision for assessment of the income of insurance business. The Income-tax Officer in making the assessment orders made some adjustments in the accounts which the appellant contends, he has no power to do under these provisions. The question in these appeals is whether he had the power to make these adjustments.

Sub-section (7) of section 10 of the Act makes the special provision for the assessment of the income of insurance business and that is in these terms :

“Notwithstanding anything to the contrary contained in sections 8, 9, 10, 12 or 18, the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Schedule to this Act.”

Rule 2 in the Schedule lays down in clauses (a) and (b) two different methods for calculating the profits and gains of a life insurance business and provides that whichever of these two methods results in larger profits being arrived at, has to be adopted. *The relevant portion of rule 2 is in these terms :*

“Rule 2.—The profits and gains of life insurance business shall be taken to be either—

(a) the gross external incomes of the preceding year from that business less the management expenses of that year, or

(b) the annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938 (IV of 1938) in respect of the last intervalation period ending before the year for which the assessment is to be made ... so as to exclude from it any surplus or deficit included therein which was made in any earlier intervalation period and any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business, whichever is the greater.”

Then follows a proviso which sets out a certain limit for management expenses to be allowed but that is not material for this judgment. It is not in dispute that the method laid down in clause (b) would in the present cases produce the larger income and had, therefore, to be followed. The relevant part of rule 3 of the Schedule on which the arguments in these cases turn may now be set out :

“Rule 3.—In computing the surplus for the purpose of rule 2—

(a).....

(b) any amount either written-off or reserved in the accounts or through the actuarial valuation balance-sheet to meet depreciation of or loss on the realisation of securities or other assets shall be allowed as a deduction, and any sums taken credit for in the accounts or actuarial valuation balance-sheet on account of appreciation of or gains on the realisation of the securities or other assets shall be included in the surplus :

Provided that if upon investigation it appears to the Income-tax Officer after consultation with the Controller of Insurance that having due regard to the necessity for making reasonable provision for bonuses to participating policy-holders and for contingencies, the rate of interest or other factor employed in determining the liability in respect of outstanding policies is materially inconsistent with the valuation of the securities and other assets so as artificially to reduce the surplus, such adjustment shall be made to the allowance for depreciation of, or to the amount to be included in the surplus in respect of appreciation of, such securities and other assets, as shall increase the surplus for the purposes of these rules to a figure which is fair and just.”

No other rule in the Schedule was referred to at the Bar.

What had happened was this. The assessee had debited a sum of Rs. 18,75,000 to its Consolidated Revenue Account and credited it to the Investment Reserve Fund. There is no dispute that the assessee had to maintain the Investment Reserve Fund. The transfer had been made because the assessee thought that the securities in respect of which the Investment Reserve Fund had been constituted having depreciated the fund had become inadequate. By this transfer the assessee's surplus, on which the tax had to be assessed under rule 2, was reduced. The Income-tax Officer thought that this transfer made the balance in the Investment Reserve Fund

exceed the deficit disclosed on the book values of the securities in that fund by Rs. 30,420. He also checked up the market value of the securities and came to the conclusion that they had been undervalued in the books by the assessee. In his view, the Investment Reserve Fund was for the aforesaid reasons actually in excess by Rs. 1,89,185 of the amount which it should have had to its credit. He, therefore, directed that the transfer from the Revenue Account to the Investment Reserve Fund be reduced by Rs. 1,75,000. The assessee appealed to the Appellate Assistant Commissioner and he directed that the transfer to the Investment Reserve Fund be reduced by Rs. 1,45,000 instead of Rs. 1,75,000. On a further appeal by the assessee to the Income-tax Appellate Tribunal, it was held that the adjustment could only be made under the proviso to rule 3 (b) of the Schedule and that that rule required a prior consultation with the Controller of Insurance, and as that had not been made, the adjustment was wholly illegal. The Tribunal, therefore, ordered that the transfer of Rs. 18,75,000 made by the assessee as aforesaid had to be accepted as a whole.

The Commissioner then applied to the Tribunal under section 66 (1) to state a case but that having been rejected he moved the High Court of Punjab for an order on the Tribunal to state a case under section 66 (2) of the Act. The High Court made an order on the Tribunal and the latter thereupon stated a case setting out the facts earlier mentioned and referring the following question to the High Court for its decision :

“Whether upon the facts found by the Tribunal, the Income-tax Officer had in this case jurisdiction to proceed to make adjustment in terms of rule 3 (b) of the Schedule to the Indian Income-tax Act.”

The High Court took the view that the matter did not come within rule 3 (b) of the Schedule and, therefore, no question of consultation with the Controller of Insurance arose. In the High Court's opinion the Income-tax Officer had not been deprived of the authority of correcting errors of the kind that had been detected in these cases and the proviso was not intended to cover those cases where, as in the present, the assessee in order to evade income-tax, undervalued his securities. The High Court, therefore, answered the question in the affirmative. The present appeals are against this judgment of the High Court.

It seems to us that the decision of the High Court is clearly erroneous. Under rule 2 of the Schedule the Income-tax Officer has to compute the profits and gains of a Life Insurance Company at the greater of the two methods of assessments mentioned in clauses (a) and (b). There may be no restriction upon his jurisdiction in the computation of profits and gains under clause (a) but under clause (b) the computation can be made within a limited field. He has to accept the annual average of the surplus disclosed by the actuarial valuation made in accordance with the Life Insurance Act in respect of the last intervaluation period, so as to exclude therefrom any surplus or deficit included therein which was made in the earlier intervaluation period, and expenditure not allowable under section 10 in computing the profits. This is made explicit by rule 3 which makes it obligatory upon the Income-tax Officer to make the computation of the surplus for the purpose of rule 2 according to the scheme provided in clauses (a), (b) and (c) of rule 3. Under rule 2 (b) of the Schedule the Income-tax Officer has, therefore, no power to change the figures in the account of the assessee. He has to take the surplus as disclosed by the actuarial valuation made by the assessee under the Insurance Act and, then to arrive at the average mentioned in the rule. He has the power to exclude any surplus or deficit included in the actuarial valuation in respect of an earlier intervaluation period and any expenditure other than an expenditure which may under section 10 of the Act be allowed. What the Income-tax Officer in the present case did does not come within rule 2 (b). This is not disputed.

It is furthermore not in dispute that apart from the provisions in rule 3 of which only clause (b) is relevant for our purpose, there is no other provision in the Schedule which authorises an Income-tax Officer to make adjustments in the actuarial valuation made by the assessee. When we come to rule 3 (b) we find that the first part of it lays down that it shall be obligatory on the Income-tax Officer to allow certain

amounts written-off or reserved by the assessee as a deduction and to include in the surplus any sums for which credit has been taken on account of appreciation or gains on the realisation of the securities or other assets. This part of the rule only compels the Income-tax Officer to allow certain amounts as deductions and to include certain amounts for which credit had been taken in the accounts of the assessee. It, therefore, does not warrant what the Income-tax Officer did, namely, to adjust the accounts on the basis of a revaluation made by him.

Then we come to the proviso in rule 3 (b). It says that if it appears to the Income-tax Officer having regard to certain matters to which it is not necessary to refer here in detail, that the rate of interest or other factor employed in determining the liability in respect of outstanding policies is materially inconsistent with the valuation of the securities and other assets so as artificially to reduce the surplus, then he would have the power to make certain adjustments after consultation with the Controller of Insurance. Quite clearly the adjustment made in the present case by the Income-tax Officer was not of the variety mentioned in the proviso. He does not say that he made the adjustment because he found that any rate of interest was inconsistent with the valuation of securities or other assets. The adjustment made by him had nothing to do with any rate of interest. It was made only because he thought that the securities had been undervalued. This he had no power to do under the proviso. This again is not in dispute.

The result, therefore, is that we find nothing in the rules justifying the adjustment made by the Income-tax Officer in the present cases. We have set out the relevant provisions and we think that they do not contemplate any other adjustment of the figures in the accounts of the insurance companies apart from what they expressly provide for. We have shown that the present adjustment does not fall within those so expressly provided for.

The only other question is, is there a general right to correct the errors in the accounts of an Insurance Company when assessing the income-tax? The High Court thought there was. We are wholly unable to agree with this view. The assessment of the profits of an insurance business is completely governed by the rules in the Schedule and there is no power to do anything not contained in it. The reason may be that the accounts of an insurance business are fully controlled by the Controller of Insurance under the provisions of the Insurance Act. They are checked by him. He has power to see that various provisions of the Insurance Act are complied with by an insurer so that the persons who have insured with it are not made to suffer by mismanagement. A tampering with the accounts of an insurer by an Income-tax Officer may seriously affect the working of Insurance Companies. But apart from this consideration, we feel no doubt that the language of section 10 (7) and the Schedule to the Income-tax Act makes it perfectly certain that the Income-tax Officer could not make the adjustment that he did in these cases.

It may be pointed out that the question referred was confined to the powers of the Income-tax Officer under rule 3 (b) of the Schedule. Indeed learned Counsel for the assessee did not contend to the contrary. The High Court, as may have been noticed, held that the proviso to rule 3 (b) was not intended to cover cases like the present. It would appear, therefore, that the High Court thought that the Income-tax Officer had no power under the rule to make the adjustment. It however nonetheless answered the question in the affirmative. Obviously what was meant was that the Income-tax Officer had the power quite apart from the rule, to make all adjustments to prevent evasion of tax. The High Court in fact expressly said that the rule did not deprive the Income-tax Officer of the power to do this. It is clear that the High Court had travelled beyond the question. No objection having been taken at the Bar to this procedure, we have dealt with the matter from this point of view also. The question framed has to be answered in the negative.

We would for this reason allow the appeals with costs.

Hidayatullah, J.—I agree but would like to add the following.

These are three appeals by certificate granted by the High Court of Punjab under section 66-A of the Income-tax Act against its judgment dated 2nd March, 1960.

The appellant is the Life Insurance Corporation (Unit: Bharat Insurance Company, Ltd.—original appellant). The appeals relate to assessment years 1952-53, 1953-54 and 1954-55, and the corresponding years of account were the calendar years 1951, 1952 and 1953. The assessment was made on the original appellant Bharat Insurance Co., Ltd., by the Income-tax Officer, Companies Circle, New Delhi under the rules framed for assessment of Insurance Companies pursuant to section 10, sub-section (7) of the Income-tax Act, on the basis of the annual average of the surplus of the insurance company as found by actuarial valuation in the last intervalation period of four years ending on 31st December, 1951, and accepted by the Controller of Insurance under the Insurance Act, 1938. In this quadrennium, the Bharat Insurance Co., Ltd., had debited a sum of Rs. 18,75,000 in the consolidated revenue account from 1st January, 1948, to 31st December, 1951, and had transferred the same to the investment reserve fund to meet an alleged depreciation in the value of securities. The Income-tax Officer compared the book value and the market value of the stocks and shares and found that that insurance company had undervalued certain shares and securities by Rs. 1,58,756 in the aggregate, and increased the investment reserve fund by a sum of Rs. 30,420 which was not required. The Income-tax Officer disallowed Rs. 1,75,000 from the total amount of Rs. 1,89,186 and added it to the surplus for calculating tax. He held at the same time that in his opinion the balance left over "provided adequate cover as contemplated by rule 3 (b) of the Rules under section 10 (7) of the Insurance Act". On appeal, the Appellate Assistant Commissioner reduced the figure of Rs. 1,89,186 to Rs. 1,61,770. He also reduced the amount of Rs. 1,75,000 to Rs. 1,45,000. With this modification (among some others) he dismissed the appeal. Against the order of the Appellate Assistant Commissioner appeals were filed respectively by the Income-tax Officer, Companies Circle (1), New Delhi-1 and the Bharat Insurance Co., Ltd. There were thus six appeals in respect of the three assessment years. The Tribunal held by its order dated 23rd October, 1956, as follows :

"The Income-tax Officer objects to the relief given by the Appellate Assistant Commissioner while the assessee objects to the adjustments which were made by the Income-tax Officer *in toto*. The proviso to rule 3 (b) of the Schedule appended to section 10 (7) clearly lays down that the Income-tax Officer has to consult the Controller of Insurance before he becomes competent to make any adjustments to the actuarial surplus disclosed by the valuation. In this case no consultation with the Controller of Insurance appears to have been made. The adjustments made by the Income-tax Officer on this account are, therefore, set aside. The assessments will be modified accordingly."

The Commissioner of Income-tax, Delhi and Rajasthan, then moved the Tribunal for a Reference to the High Court suggesting for a decision on the question :

"Whether the proviso to rule 3 (b), Schedule to Indian Income-tax Act, 1922 was applicable and whether the Income-tax Officer was bound to consult the Controller of Insurance in this case where no question arose about the rate of interest or other factor employed in determining the liability in respect of outstanding policies ?"

The Tribunal drew up a consolidated statement of the case for the three assessment years and referred the following question for the decision of the High Court:

"Whether upon the facts found by the Tribunal the Income-tax Officer had in this case jurisdiction to proceed to make adjustments in terms of rule 3 (b) of the Schedule to the Indian Income-tax Act ?"

In the High Court, the Commissioner made an application under section 66 (2) of the Income-tax Act for an order directing the Tribunal to refer the former question ; but that application was disposed of along with the Reference and the High Court by its order under appeal answered the latter question against the assessee and dismissed the application under section 66 (2) of the Income-tax Act. Khosla. C.J., and Grover, J., who disposed of the above Reference, observed that the question which they were answering comprehended the other question. The High Court in disposing of the Reference held that the Income-tax Officer had the jurisdiction "to deal with the matter in the manner employed by him" and "was not obliged to consult the Controller of Insurance before he corrected the valuation of the securities". It may be mentioned that while the Reference was pending in the High Court a Government Administrator took over the Insurance Company. Subsequently, the Life Insurance

Corporation, by virtue of a notification of the Government of India under section 4 of the Life Insurance Corporation Act, 1956, took over from 6th July, 1960 the assets and liabilities of the Insurance Company in respect of the controlled business as defined in section 2 (3) of the Corporation Act. The Corporation, in the circumstances, was substituted as the appellant in place of the Insurance Company under section 9 of the Life Insurance Corporation Act. In these appeals, it is contended that the High Court was in error in the conclusion it reached and the answer to the question should have been in favour of the Life Insurance Corporation and against the Department.

Before dealing with this case, a reference in brief to the scheme of the Insurance Act and to the Rules framed under section 10 (7) of the Income-tax Act for assessment of Insurance Companies is necessary. By section 11 of the Insurance Act, every insurer in India and every foreign insurer in respect of the insurance business transacted by him in India is required to prepare at the expiration of each calendar year with reference to that year (a) a balance-sheet, (b) a profit and loss account and (c) a revenue account. Special forms are prescribed and the Schedules to the Act provide by Regulations what should be shown in these accounts. The balance-sheet, profit and loss account, revenue account including accounts which the other provisions require the insurer to prepare, must then be audited by an auditor. By section 13 of the Insurance Act, every insurer, carrying on life insurance business, is required, at intervals of not less than 3 years, to cause an actuarial investigation to be made into the financial condition of life insurance business carried on by him, including a valuation of its liabilities in respect of that business. An abstract of the report of the actuary must then be prepared according to prescribed regulations. These accounts and the abstract, together with other statements, etc., must be submitted to the Controller of Insurance. The Controller may ask for further information and, if he so desires, take evidence and order a revaluation causing at the same time an investigation to be made. The Insurance Act further requires that every insurer must invest and at all times keep invested, assets equivalent to the liabilities on matured claims or on the policies in the life business maturing for payment. Sections 27 and 27-A indicate the kinds of investments in which the insurer must invest or keep invested the assets and the controlled fund.

The balance-sheet of life insurance business must always be prepared as a separate document. The regulations enjoin that a statement in Form-AA showing the market value and the book value of the assets in India must be appended to the balance-sheet. The accounts must be signed and certified and in particular, a certificate must be appended explaining how the values as shown in the balance-sheet of the investment of stocks and shares have been arrived at and how the market value thereof has been ascertained for the purpose of comparison with the values so shown. There has further to be another certificate that the items in respect of reversions and life interests have been valued as on the date of the balance-sheet by an actuary and the assets shown under the heading "investments" have not been valued at amounts exceeding the realisable or market value. This precaution is necessary: otherwise there may not be adequate cover for the liabilities. For this purpose, Form-AA which has to be annexed to the balance-sheet must show a classified summary of the assets on the date of the balance-sheet and it must show in particular :

(a) the value for which credit is taken in the balance-sheet for each of the above-mentioned classes of assets ;

(b) the market value of such of the abovementioned classes of assets as has been ascertained from published quotations after deduction of accrued interest included in market prices in those cases where accrued interest is included elsewhere in the balance-sheet ;

(c) how the value of such of the abovementioned classes of assets as has not been ascertained from published quotations has been arrived at.

The revenue account has to be prepared in four forms of which Form-D shows the revenue account applicable to life insurance business in respect of the year and

the other three documents are statements of life insurance policies for the same year (Form-DD), the additions to and deductions from policies (Form-DDD) and particulars of policies forfeited or lapsed in the year (Form-DDDD). The Regulations for the preparation of the abstract of the report of the Actuary are to be found in the Fourth Schedule to the Insurance Act. This Schedule is in two parts. The second part lays down *inter alia* that every abstract shall show the average rates of interest yielded by the assets, whether invested or uninvested, constituting the life insurance fund for each of the years covered by the valuation period and Regulation 3 of Part I lays down how the average rate of interest yielded in any year by the assets constituting the life insurance fund must be calculated. This is a complicated calculation which it is unnecessary to describe here. The abstracts must explain the specific manner in which the said average rate of interest has been calculated. The consolidated revenue account has to be shown in Form-G and a final valuation balance-sheet is required to be prepared in Form-I which compares the net liability under business as shown in the summary and valuation of the policies on the one hand with the balance of life insurance fund as shown in the balance-sheet on the other and this discloses the surplus or the deficiency as the case may be. As investments depreciate, an investment reserve fund is maintained to which amounts are transferred to make up for the shortfall. The insurance company is thus required to maintain an insurance fund sufficient to cover its liabilities in investments and depreciation in the value of the investments must be specially provided for by making other investments which are kept in the investment reserve fund. We are now in a position to understand the provisions of the Income-tax Act which include references to these documents.

To begin with, it must be remembered that insurance companies are assessed somewhat differently from other business organisations. Normally sections 8, 9, 10 and 12 of the Income-tax Act apply to the assessment of business organisations but the rules for assessment contained in those sections do not apply to the assessment of an insurance company. Section 10 of the Income-tax Act deals with the head "profits and gains of business, etc.". Sub-section (7), however, says that notwithstanding anything to the contrary contained in sections 8, 9, 10, 12 or 18 the profits and gains of any business of insurance and the tax payable thereon shall be computed in accordance with the rules contained in the Schedule to the Act. These rules provide the mode of computing the profits and gains of life insurance business. Under rule 2, the profits and gains of life insurance business are taken to be either—

"(a) the gross external incomes of the preceding year from that business less the management expenses of that year, or

(b) the annual average of the surplus arrived at by adjusting the surplus or deficit disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938 (IV of 1938), in respect of the last intervalation period ending before the year for which the assessment is to be made so as to exclude from it any surplus or deficit, included therein which was made in any earlier intervalation period and any expenditure other than expenditure which may under the provisions of section 10 of this Act be allowed for in computing the profits and gains of a business whichever is greater.

* * * * *

In this case the second method was applicable. Rule 3 (in so far as it is relevant for our purpose) then provides as follows :

"(a)

(b) any amount either written-off or reserved in the accounts or through the actuarial valuation balance-sheet to meet depreciation of or loss on the realisation of securities or other assets shall be allowed as a deduction, and any sums taken credit for in the accounts or actuarial valuation balance-sheet on account of appreciation of or gains on the realisation of the securities or other assets shall be included in the surplus :

Provided that if upon investigation it appears to the Income-tax Officer after consultation with the Controller of Insurance that having due regard to the necessity for making reasonable provision for bonuses to participating policy-holders and for contingencies, the rate for interest or other factor employed in determining the liability in respect of outstanding policies is materially inconsistent with the valuation of the securities and other assets so as artificially to reduce the surplus, such adjustment shall be made to the allowance for depreciation of, or to the amount to be included in the surplus in respect of appreciation of, such securities and other assets, as shall increase, the surplus for the purposes of these rules to a figure which is fair and just ;

(c) * * * * *

Rule 2 shows what shall be taken to be the profits and gains of the insurance company. Rule 3 shows what changes can be made in the annual average of the surplus. The purport of rule 3, in the context of this case, may now be stated in simple language. It provides in its main part that amounts reserved in the accounts or through the actuarial valuation balance-sheet to meet depreciation of securities shall be allowed as a deduction and *e converso* any sums taken credit for in the accounts or actuarial valuation balance-sheets on account of appreciation of securities shall be included in the surplus. In short, the amount by which the value of securities depreciates is allowed as a deduction from the surplus and the amount of appreciation of securities is included in the surplus. There is no question here of appreciation and the latter part of the main rule may, therefore, be ignored. This case is concerned only with the depreciation of the securities in the reserves as shown in the accounts and through the actuarial valuation balance-sheets. If such depreciation in fact takes place, it is open to the insurance company to claim that it be allowed as a deduction from the surplus and it must be allowed. But by undervaluing the stocks and shares, it is always possible artificially to reduce the surplus by making a part of it go into the reserve to take the place of the amount by which the stocks and shares are alleged to have, but have not in fact, depreciated. The proviso, which is annexed to the main rule, takes note of the existence of such a possibility and provides that if the Income-tax Officer on investigation finds (after consultation with the Controller of Insurance) that the rate of interest or other factor employed in determining the liability in respect of outstanding policies is materially inconsistent with the valuation of the securities and other assets so as artificially to reduce the surplus, he may make such adjustments to the allowance for depreciation as shall increase the surplus to a figure which is fair and just. The proviso further says that in doing so, the necessity for making reasonable provision for bonuses to participating policy-holders and for contingencies must be taken into consideration. Put in simple language, it means that the Income-tax Officer can, after investigation and consultation with the Controller of Insurance, increase the surplus to a figure which is fair and just. But this action is open to him only if the valuation of the securities and other assets has been artificially manipulated to reduce the surplus by making the rate of interest or other factor employed in determining the liability in respect of outstanding policies inconsistent with the valuation of the securities. Further, the Income-tax Officer, before he makes any change, must pay due attention to the necessity for making reasonable provision for bonuses to participating policy-holders and contingencies.

The power which is conferred on the Income-tax Officer under the proviso clearly has its limitations, and is hedged in by conditions. In the present case, the Income-tax Officer admittedly did not consult the Controller of Insurance. Nor did he consider the necessity for making reasonable provision for bonuses to participating policy-holders and for contingencies. Nor did he establish that the rate of interest or other factor employed in determining the liability in respect of outstanding policies was materially inconsistent with the valuation of the securities or other assets. What he did was to find out the market value of stocks and shares and to compare that value with the valuation actually made and on finding that they were undervalued, to add a certain amount to the surplus for tax purposes. The Appellate Assistant Commissioner differed about the market value of the stocks and shares and reduced the amount which was added but did no more. The Tribunal, which reversed these orders went merely by the failure of the Income-tax Officer to consult the Controller of Insurance. The two questions (that proposed by the Commissioner and that actually referred) bring into relief respectively the actions of the Income-tax Officer and the order of the Tribunal. The question as answered refers to the Income-tax Officer's decision while the other was limited to the Tribunal's order. The Department did not seek to place its case under the proviso either before the High Court or before us, perhaps, because the conditions in the proviso (whether they be directory or mandatory), had not been followed at all. The Department claimed that the

matter fell to be governed by the main rule without the assistance of the proviso and this contention appears to have been accepted by the High Court.

As has been shown above, Form-G is the consolidated revenue account. The Bharat Insurance Company had, during the quadrennium commencing on 1st January, 1948, and ending on 31st December, 1951, transferred to the investment reserve fund a sum of Rs. 18,75,000 and shown it in Form-G. The balance of life fund thus stood at Rs. 5,45,88,286-1-10 as against the net liability of Rs. 5,19,42,924, and there was a surplus. The valuation balance-sheet in Form-I as on 31st December, 1951, thus was:

	Rs.		Rs.
Net liability under business as shown in the summary and valuation	5,19,42,924	Balance of Life Assurance Fund as shown in the Balance-sheet	5,45,88,286
Surplus	26,45,362		
	<u>5,45,88,286</u>		<u>5,45,88,286</u>

The valuation abstract prepared under the Fourth Schedule showed that the Actuary had assumed the rate of interest at 3% per annum and he found that the average rate of interest earned on the mean life fund in each year was as follows :

Year ending 31st December, 1948	..	3.5%
Year ending 31st December, 1949	..	3.27%
Year ending 31st December, 1950	..	3.27%
Year ending 31st December, 1951	..	3.26%

The Income-tax Officer did not concern himself with the rate of interest employed in determining the liability in respect of outstanding policies. He considered the valuation of stocks and shares held in the life fund with a view to ascertaining whether the sum of Rs. 18,75,000 transferred to the investment reserve fund to balance an alleged depreciation in the value of stocks and shares was justified or not. He examined for this purpose the details of the alleged depreciation amounting to Rs. 22,64,733 which had been worked out by the assessee company and observed that after the transfer of Rs. 18,75,000 to the investment reserve fund the balance to the credit of the fund was Rs. 22,95,154 when it need not have been more than Rs. 22,64,733 and this showed an excess of Rs. 30,420. This excess he disallowed. He then found out the market rate of stocks and shares in the fund and came to the conclusion that some of these were undervalued by a sum of Rs. 1,58,756. He held that an excess of Rs. 1,89,186 was transferred to the investment reserve fund from the surplus. According to him, the surplus of Rs. 26,45,362 shown in Form-I required to be adjusted and he added a lump sum of Rs. 1,75,000 to the surplus. In other words, the total depreciation claimed under rule 3 (b) as an allowance was not accepted. The sum of Rs. 1,75,000 was reduced by the Appellate Assistant Commissioner to Rs. 1,45,000 and it was altogether cancelled by the Income-tax Appellate Tribunal.

The learned Judges of the High Court in dealing with this matter observed that the excess of Rs. 30,420 was not an actual depreciation and no provision need have been made in the reserve fund for this sum. They also held that the Income-tax Officer had rightly held that some of the stocks and shares had been deliberately undervalued. They accepted the proposition that the making of an adjustment in the surplus on a finding that the rate of interest or other factor employed in determining the liability in respect of outstanding policies and other assets was materially inconsistent with the valuation of the securities and other assets, and the making of adequate provision for bonuses to participating policy-holders and contingencies was a matter for a specialist and that the Income-tax Officer, if he made an adjustment, should procure the advice of the Controller of Insurance before making any change on the basis of his own knowledge. But they held that the proper valuation of the securities did not require a specialist and that any person could get market quotations and find out the value of the securities. According to the learned Judges, although the proviso enjoined upon the Income-tax Officer the duty to consult the Controller of Insurance and also to make adjustments in a particular way, the main rule allowed

the Income-tax Officer to fix the amounts of permissible deductions on the basis of a correct valuation of the securities and the Income-tax Officer's jurisdiction in this respect was not in any way controlled. According to them, the fixing of the correct value of the assets was not the sort of adjustment which was contemplated by the proviso ; therefore, neither was prior consultation necessary nor were the conditions precedent as laid down in the proviso applicable. They referred to the decision of the Bombay High Court in *Western India Life Insurance Co., Ltd.*, In re¹, and observed that such action was held permissible under rule 30 of the superseded rules which they held was *in pari materia* with the main rule 3 (b), and to the decision in *Commissioner of Income-tax, Bombay, Sind and Rajasthan v. Indian Life Assurance Co., Ltd.*², in which the dictum of the High Court was applied by the Sind Chief Court. They concluded :

"It is therefore, clear that the proviso does not apply to a case where the Income-tax Officer has to see whether the securities have been correctly valued or not. He must satisfy himself without any reference to the Controller of Insurance that the securities which are being transferred to the reserve fund are not more than necessary to meet depreciation or loss that has actually been suffered, and to determine this he must have the correct valuation of the securities."

In the result, they held that the Income-tax Officer had "full jurisdiction" to deal with the matter in the manner employed by him.

Mr. Setalvad on behalf of the Life Insurance Corporation pointed out that the actuarial valuation balance-sheet in Form-I had determined the surplus by deducting from the Life Insurance fund as on the valuation date the net liability under the life insurance business. He pointed out that in working out this liability the Actuary had assumed the rate of interest at 3% per annum and to arrive at this figure, he had taken into consideration the average interest yield for the four years covered by the valuation. The interest yield thus was obtained by properly following the procedure laid down by Regulation 3 of Part 1 of the Fourth Schedule to the Insurance Act. He contended that if the interest yield were found to be lower by reason of the reduction of the amount of depreciation, the liability for the policies, as calculated in the accounts, would be disturbed and the liability would increase. He pointed out that rule 30 of the previous rules was amended by the addition of a proviso in the new rule 3 (b) to make it incumbent that an adjustment in respect of depreciation of securities in the actuarial balance-sheet should only be made after complying with certain conditions. He contended that action could only be taken under the proviso and in accordance with its strict terms. He submitted that by merely reducing the amounts transferred to the investment reserve fund the Income-tax Officer could not increase the surplus, for in doing so, he reduced the cover and thus seriously disturbed the provision for liability under the policies and the provision for bonuses to participating policy-holders and contingencies, and that such action of the Income-tax Officer was without jurisdiction.

On behalf of the Department, Mr. Gopal Singh contended that there was a general power in the Income-tax Officer derived from the main rule 3 (b) and independent of the proviso to make such an adjustment. Mr. Gopal Singh did not rely upon the proviso and contended that the Income-tax Officer could find out from the market quotations the value of stocks and shares and if he found a disparity, he could make adjustments by refusing to allow the deduction which was claimed under rule 3 (b). According to him, it was not necessary to go to the proviso at all and in any event, consultation with the Controller of Insurance was not absolutely necessary and what he did was within his jurisdiction. He submitted that the Income-tax Officer had jurisdiction to decide what was just and proper and had done so under his general power flowing from the main rule 3 (b) without the aid of the proviso.

It is clear that the Income-tax Act contemplates that the assessment of insurance companies should be carried out not according to the ordinary principles applicable

1. (1938) 6 I.T.R. 44 : 40 Bom.L.R. 447 : 176
I.C. 970 : 11 R.B. 61 : A.I.R. 1938 Bom. 345.

2. (1946) 14 I.T.R. 347 : I.L.R. (1945) Kar.

362 : 222 I.C. 643 : (1946) Sind. (Rul.) 132 :
A.I.R. 1946 Sind. 25.

to business concerns as laid down in section 10, but in quite a different manner. Insurance companies do not compute their profits in the ordinary way because premiums cover risks which run into future years and loss includes losses from previous years. The method prescribed ensures that by taking the average of several years a fair and reasonable conclusion is reached. Actuarial estimation plays an important part and surplus only results when there is an excess of the fund over the liability after all other charges are met. The rules which have been quoted lay down two different methods of ascertaining profits. Rule 2 (a) merely compares the gross external incomings of the preceding year with the management expenses. Rule 2(b) contemplates the annual average of the surplus of deficit disclosed by actuarial valuation.

In the present case the first limb of rule 2 did not apply. So the annual average of the surplus found by the Actuary had to be taken and from it the surplus of the last intervaluation period had to be deducted as also expenditure allowable under section 10 of the Income-tax Act. This is the basic calculation and they were followed. Certain special limitations indicated in the proviso to rule 2 and rule 3 (a) are not relevant for the present case. Under the main part of rule 3 (b) certain special deductions and additions must be made to the annual average of the surplus determined under the second rule. Since the life fund is held in securities and the price of stocks and shares fluctuates, provision has been made in rule 3 (b) to make adjustments. Rule 3 (b) in its main part speaks of adjustments on the basis of the accounts and amounts as entered in the accounts determine what must be added to or deducted from the surplus. The Income-tax Officer must deduct from the annual average of the surplus for purposes of rule 2 any amount entered in the account to cover depreciation of the securities and assets and add any amount taken credit for on account of appreciation. The Income-tax Officer here follows the accounts and gives effect to the entries such as they are. The provision is mandatory and the Income-tax Officer has no discretion.

If the Income-tax Officer doubts the accounts, his powers are defined by the proviso. Rule 3 (b) which allows the Income-tax Officer to deduct from or add to the surplus amounts shown in the accounts for depreciation and appreciation of securities as the case may be, does not confer on him a power to disturb the annual average of the surplus at his sweet will. No doubt, the perception of discrepancy between what is entered in the accounts and what in fact, is not something which is or can be made the subject of rules. Rules can only provide how the Income-tax Officer must proceed in the matter if he finds an inaccuracy. The entire subject of such disparity between fact and actual entries is comprehended in the proviso. If the Income-tax Officer accepts the accounts he must reduce or increase the surplus by the amounts actually shown for depreciation or appreciation in the accounts. His powers under the main rule end there. If he discovers a discrepancy (not *de minimis*) he must proceed under the proviso. The proviso requires him to consult the Controller of Insurance and to bear in mind that reasonable provision has to be made for bonuses to participating policy-holders and for contingencies, and he can act only where the rate of interest or other factor employed in determining the liability under the policies is materially inconsistent with the valuation of securities and this results in the artificial reduction of the surplus. It is clear that the proviso negatives the existence of a separate general power. Action has to be taken in the manner laid down in the proviso or not at all.

In the present case, the Income-tax Officer did not follow the proviso at all. The Department did not rely upon the proviso in the High Court and even before us did not seek to justify the action of the Income-tax Officer with reference to the proviso. No doubt, an attempt was made before us to limit the generality of the question debated in the High Court to the specific point decided by the Tribunal and outlined in the question suggested by the assessee. But the gist of the matter is the same whichever way one looks at it. The adjustment of the surplus in the matter of the appreciation and depreciation of securities not on the basis of the accounts but on the basis of the Income-tax Officer's discretion can only be done in the manner laid

down in the proviso. Such power is not available under the main rule which merely allows book entries to be worked into the surplus.

I find it impossible to endorse the view of the High Court that the Income-tax Officer had any general power to make adjustments independently of the proviso. If he detected any discrepancy he had to proceed under the proviso. To hold otherwise would make the proviso entirely redundant, and it is quite clear that such could not be the intention. Cases under the former rule 30 cannot be used as precedents because the present rule 3 (b) has been materially altered by the addition of the proviso. Formerly the rule tried to serve both the objects by using the word "may", but the word "may" which gave a discretion to the Income-tax Officer could lead to arbitrary actions and the rule is now in two parts, the main rule leaving no discretion and the proviso conferring a power subject to certain conditions.

In the result, I disagree with the High Court in the answer which it gave to the question. The proper answer was in the negative. I agree therefore, that the appeals be allowed with costs on the respondent here and in the High Court.

V.S.

Appeals allowed.

THE SUPREME COURT OF INDIA.

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Shivram Poddar

.. *Appellant.**

v.

Income-tax Officer, Central Circle II, Calcutta and another

.. *Respondents.*

Income-tax Act, (XI of 1922), sections 23, 25, 26 and 44 (before amendment by Act (XI of 1958). Assessment procedure—Dissolution of firm—Change in constitution—Discontinuance of business—Succession to business.

Partnership law and Income-tax law—Firms personality as assessable unit—Whether survives reconstitution.

High Court—Writ Jurisdiction—When to be invoked in revenue matters—Income-tax Act, a self contained code—Questions relating to assessment, primarily within jurisdiction of revenue authorities—High Court not to be asked to assume facts.

A firm of four partners carrying on business in commission agency etc., was dissolved in February, 1950. On dissolution, the firm's business was, presumably, discontinued. For the account year ended 31st March, 1950 relevant to the assessment year 1950-51, the Income-tax Officer served a notice on one of the partners requiring him to submit the firm's return. The partner protested and later moved the High Court for the issue of a writ restraining the Officer from making the assessment. On the High Court's refusal to issue the writ, on an appeal to the Supreme Court, by Special Leave.

Held, that by the discontinuance of its business, the firm, which was an unregistered firm, neither ceased to be liable to pay tax on the income earned by it, nor could a procedure different from the one prescribed under Chapter IV apply for the assessment of the income of the firm.

The procedure of assessment of a firm after it has discontinued its business, whether it is dissolved or not, will be as under section 23. Section 44 merely provides an added incident, that all persons who were partners at the time of discontinuance are jointly and severally liable to pay the tax payable by the firm. Section 44, however (as it stood before its amendment in 1958) is attracted only when the business of the firm is discontinued i.e., when there is complete cessation of the business, and not when there is a change in the ownership of the firm or in its constitution.

Under the ordinary law governing partnerships, modification in the constitution of the firm, in the absence of a special agreement to the contrary, amounts to dissolution of the firm. But the Income-tax Act recognizes a firm for purposes of assessment as a unit independent of the partners constituting it, it invests the firm with a personality which survives reconstitution.

The provisions relating to assessment on reconstituted or newly constituted firms are obligatory. Where the firm is dissolved, but the business is not discontinued, there being a change in the constitution of the firm assessment has to be made under section 26 (1). If there be succession to the business, assessment has to be made under section 26 (2). In either case, it is the assessment of the income of the firm and the assessment must be made upon the firm.

Held also, that it is for the Revenue Authorities to ascertain the facts applicable to a particular situation and to grant appropriate relief in the matter of assessment to tax. The Income-tax Act provides a complete machinery for assessment to tax and for relief in respect of improper or erroneous orders. In attempting to bypass the provisions of the Income-tax Act and by inviting the High Court to decide questions which are primarily within the jurisdiction of the Revenue Authorities, the party approaching the Court has often to ask the Court to make assumptions of facts which remain to be investigated by the Revenue Authorities. Resort to the High Court in exercise of its extraordinary jurisdiction conferred or recognized by the Constitution in matters relating to assessment, levy and collection of income-tax may be permitted only when questions of infringement of fundamental rights arise, or where, on undisputed facts, the taxing authorities are shown to have assumed jurisdiction which they do not possess.

Appeal by Special Leave from the Judgment and Order, dated 11th January, 1962 of the Calcutta High Court in Appeal from Original Order No. 153 of 1959.

G. S. Pathak, Senior Advocate, *R. N. Baliria* and *B. P. Maheshwari*, Advocates, with him, for Appellant.

K. N. Rajagopal Sastri, Senior Advocate (*Gopal Singh* and *R. N. Sachthey*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Shah, J.—Balmukand Radheshayam—hereinafter called ‘the firm’—having its head office at Calcutta carried on business in commission agency, and cotton piece-goods. The firm which consisted of four partners—one of whom was Shivram Poddar, appellant in this appeal—was dissolved in February, 1950, and it appears that thereupon its business was discontinued. For the assessment year 1949-50, one of the partners of the firm submitted a return of its income, and it was assessed on October 28, 1952, in the status of an unregistered firm.

On March 28, 1955, the Income-tax Officer issued a notice under section 34 read with section 22 (2) of the Indian Income-tax Act, 1922, addressed to the appellant as a partner of the firm at the time of its dissolution calling upon him to submit a return of the income of the firm for the year ending March 31, 1950. The appellant moved the High Court of Judicature at Calcutta for a writ of *mandamus* under Article 226 of the Constitution commanding the Income-tax Officer to forbear from giving effect to the notice. The petition was dismissed by *D. N. Sinha, J.*, and that order was confirmed in appeal under the Letters Patent by the High Court of Calcutta. This appeal is against that judgment of the High Court.

The question which falls to be determined in this appeal is whether the income earned by the firm in the year ending March 1950 could be assessed to tax under section 44 of the Indian Income-tax Act after the firm was dissolved. Section 44 of the Indian Income-tax Act 1922, before it was amended by the Income-tax (Amendment) Act, 1958, stood as follows :

“Where any business, profession or vocation carried on by a firm or association of persons has been discontinued, or where an association of persons is dissolved, every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall, in respect of income, profits and gains of the firm or association, be jointly and severally liable to assessment under Chapter IV and for the amount of tax payable and all the provisions of Chapter IV shall, so far as may be, apply to any such assessment.”

The object of the enactment is clear : it is to authorise assessment of tax on income, profits or gains earned in a business, profession or vocation carried on by a firm or association before discontinuance of the business, profession or vocation, or before dissolution of the association, and to impose joint and several liability upon every person who was at the time of discontinuance a partner of the firm or a member of the association or at the time of dissolution a member of the association.

This Court in dealing with the effect of section 44 of the Indian Income-tax Act upon the liability of partners to be assessed in respect of the income of a firm which had discontinued its business on account of dissolution, observed in *C. A. Abraham Uppotil, Kottayam v. The Income-tax Officer, Kottayam and another*¹, at p. 770 :

1. (1961) 1 S.C.J. 673 : (1961) 1 M.L.J. (S.C.) 183 : (1961) 1 An.W.R. (S.C.) 183 :

(1961) 2 S.C.R. 765 (770).

"In effect, the Legislature has enacted by section 44 that the assessment proceedings may be commenced and continued against a firm of which business is discontinued as if discontinuance has not taken place. It is enacted manifestly with a view to ensure continuity in the application of the machinery provided for assessment and imposition of tax liability notwithstanding discontinuance of the business of firms."

In *Abraham's Case*¹, discontinuance of business of the firm was the result of dissolution upon death of one of the partners. The primary question in that case was about the competence of the Income-tax Officer to order the levy of penalty against a firm, after it had discontinued its business upon dissolution, for concealing the particulars of income or for deliberately furnishing inaccurate particulars of income in a return of the income of the firm. The validity of the order of assessment of income of the firm was not challenged in that case though at the date of the order of assessment the firm stood dissolved and its business was discontinued. But the Court could not adjudicate upon the legality of the order imposing penalty without deciding whether there was a valid assessment, for an order imposing penalty predicates a valid assessment. We have reiterated this view in *The Commissioner of Income-tax, Hyderabad v. Raja Reddy Mallaram*², in considering the application of section 44 of the Indian Income-tax Act in relation to the assessment of an association of persons which is dissolved.

Mr. Pathak for the appellant urged (and that was the only argument advanced in support of the appeal) that the notice addressed by the Income-tax Officer to the respondent was in law inoperative, since section 44 applies in relation to a firm only when there is discontinuance of its business and not when there is dissolution of the firm. Counsel submitted that members of an association of persons may be assessed under section 44 on discontinuance of business or upon dissolution of the association, but partners of a firm may be assessed under section 44 only on discontinuance of the business, profession or vocation carried on by the firm and not on dissolution. Discontinuance of business and dissolution of a firm are different concepts, urged Counsel, for if discontinuance included dissolution it was plainly unnecessary to make an express provision with respect to the dissolution of association of persons. In support of his contention Counsel relied upon the observations made by Chakravarti, C.J., in *R. N. Bose v. Mahindra Lal Goswami*³, at page 441 :

"That section (section 44 of the Income-tax Act, 1922) speaks of a case where any business, profession or vocation carried on by a firm or association of persons has been discontinued and a case where an association of persons is dissolved. It does not speak of a case, at least expressly, where a firm has been dissolved. It will be noticed that when speaking of the discontinuance of a business, profession or vocation, the section speaks of both a firm and an association of persons, but when speaking of dissolution, it drops the "firm".

Mr. Meyer * * * contended that discontinuance included dissolution. I am unable to accept that contention because although the dissolution of a firm must involve discontinuance of its business, the converse need not necessarily be true and a firm may conceivably continue to exist after deciding to discontinue its business as firms very often do for various purposes, such as collecting their debts."

But these observations were *obiter*, for, as observed by the learned Chief Justice, the parties before him had throughout proceeded on the footing that section 44 applied to the case of a dissolved firm, and he would also proceed on the assumption that section 44 applied to the case of a dissolved firm.

Section 44 operates in two classes of cases : where there is discontinuance of business, profession or vocation carried on by a firm or association, and where there is dissolution of an association. It follows that mere dissolution of a firm without discontinuance of the business will not attract the application of section 44 of the Act. It is only where there is discontinuance of business, whether as a result of dissolution or other cause, that the liability to assessment in respect of the income of the firm under section 44 arises. In the case of an association, discontinuance of business for whatever cause, and dissolution with or without discontinuance of business, will both attract section 44. The reason for this distinction appears from

1. (1961) 2 S.C.J. 673 : (1961) 1 M.L.J. (S.C.) 183; (1961) 1 An.W.R. (S.C.) 183; (1961) 2 S.C.R. 765. (1964) 1 M.L.J. (S.C.) 75 : (1964) 1 An.W.R. (S.C.) 75; (1964) 51 I.T.R. 285.

2. (1964) 1 I.T.J. 180; (1964) 1 S.C.J. 256 :

3. 33 I.T.R. 435 (441).

the scheme of the Income-tax Act in its relation to assessment of the income of a firm. A firm whether registered or unregistered is recognised under the Act as a unit of assessment (sections 3 and 2 (2)), and its income is computed under clauses (3) and (4) of section 23 as the income of any other unit. Section 25 (1) relates to assessment in case of a discontinued business—whether the business is carried on by a firm or by any other person. This is of course only an enabling provision giving the Income-tax Officer an option to make a premature assessment on the profits earned upto the date of discontinuance, in the year of discontinuance : *Commissioner of Income-tax v. Srinivasan and Gopalan*¹. Even if no premature assessment is made, the assessment for the entire year will be on the income computed up to the date of discontinuance. Then there is the special provision relating to assessment when at the time of making an assessment it is found that a change has occurred in the constitution of a firm, or a firm has been newly constituted : section 26 (1). The date on which the change has occurred is immaterial : it may be in the year of account, in the year of assessment or even after the close of the year of assessment. The Income-tax Officer has under section 26 (1) to assess the firm as constituted at the time of making the assessment, but the income, profits and gains of the previous year, have for the purpose of inclusion in the total income of the partners, to be apportioned between the partners who were entitled to receive the same. Sub-section (2) of section 26 relates to assessment in the case of succession to a person (which expression includes a firm) carrying on a business by another person in such capacity. These provisions have to be read with section 44, for that section provides that in the case of discontinuance of business of firm or of an association or dissolution of an association, liability to assessment is under Chapter IV and all the provisions of Chapter IV, so far as may be, apply to such assessment.

Discontinuance of business has the same connotation in section 44 as it has in section 25 of the Act : it does not cover mere change in ownership or in the constitution of the unit of assessment. Section 44 is therefore attracted only when the business of a firm is discontinued, i.e., when there is complete cessation of the business and not when there is a change in the ownership of the firm, or in its constitution, because by reconstitution of the firm, no change is brought in the personality of the firm, and succession to the business and not discontinuance of the business results. Under the ordinary law governing partnerships, modification in the constitution of the firm, in the absence of a special agreement to the contrary, amounts to dissolution of the firm and reconstitution thereof, a firm at common law being a group of individuals who have agreed to share the profits of a business carried on by all or any of them acting for all, and supersession of the agreement brings about an end of the relation. But the Income-tax Act recognises a firm for purposes of assessment as a unit independent of the partners constituting it : it invests the firm with a personality which survives reconstitution. A firm discontinuing its business may be assessed in the manner provided by section 25 (1) in the year of account in which it discontinues its business : it may also be assessed in the year of assessment. In either case, it is the assessment of the income of the firm. Where the firm is dissolved, but the business is not discontinued, there being change in the constitution of the firm, assessment has to be made under section 26 (1), and if there be succession to the business, assessment has to be made under section 26 (2). The provisions relating to assessment on reconstituted or newly constituted firms, and on succession to the business are obligatory. Therefore, even when there is change in the ownership of the business carried on by a firm on reconstitution or because of a new constitution, assessment must still be made upon the firm. When there is succession, the successor and the person succeeded have to be assessed each in respect of his actual share. This scheme of assessment furnishes the reason for omitting reference to dissolution of a firm from section 44 when such dissolution is not accompanied by discontinuance of the business.

A firm after it has discontinued its business, whether it is dissolved or not, will therefore be assessed either under section 25 (1) prematurely, or in the year of assess-

¹. (1953) 23 I.T.R. 87 : (1953) 1 M.L.J. 436 A.I.R. 1953 S.C. 113.
(S.C.) : (1953) S.C.J. 115 : 1953 S.C.R. 486 ;

ment, in both cases the procedure of assessment is as under section 23 (3) and (4) supplemented by sub-section (5). Section 44 provides an added incident that all persons who were partners at the time of discontinuance are jointly and severally liable to pay the tax payable by the firm. Under section 23 (5) by the Second Proviso to clause (a) in the case of a registered firm *the firm is liable* to pay tax on the share of the income of a partner only in the case of a partner who is non-resident. On the discontinuance of the business of a firm, however, by section 44 a joint and several liability of all partners arises to pay tax due by the firm. Except the general provisions relating to premature assessment under section 25 (1) and assessment on succession under section 26 (2) there is, in the Act, no provision which imposes joint and several liability on members of an association of persons, on dissolution or discontinuance of business and that is presumably the reason why section 44 was enacted as it stood prior to its amendment in 1958. Absence of reference to dissolution of a firm (not resulting in discontinuance) in section 44 was therefore a logical sequel to the provisions relating to assessment of firms contained in Chapter IV, especially sections 23 (5), 25 (1), 26 (1) and 26 (2).

Balmukund Radheshyam was an unregistered firm, and, by the discontinuance of the business, it neither ceased to be liable to pay tax on the income earned by it, nor could a procedure different from the one prescribed under Chapter IV apply for the assessment of the income of that firm.

We may observe that we have proceeded to decide this case on the footing that the business of the firm was discontinued on dissolution of the firm. It is, however, necessary once more to observe, as we did in *C. A. Abraham's case*¹ that the Income-tax Act provides a complete machinery for assessment of tax, and for relief in respect of improper or erroneous orders made by the Revenue Authorities. It is for the Revenue Authorities to ascertain the facts applicable to a particular situation and to grant appropriate relief in the matter of assessment of tax. Resort to the High Court in exercise of its extraordinary jurisdiction conferred or recognised by the Constitution in matters relating to assessment, levy and collection of Income-tax may be permitted only when questions of infringement of fundamental rights arise, or where on undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess. In attempting to by-pass the provisions of the Income-tax Act by inviting the High Court to decide questions which are primarily within the jurisdiction of the Revenue Authorities, the party approaching the Court has often to ask the Court to make assumptions of facts which remain to be investigated by the Revenue Authorities.

The appeal fails and dismissed with costs.

V. S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Sait Nagjee Purushotham & Co., Calicut

*.. Appellant.**

v.

The Commissioner of Income-Tax, Madras
(Now Kerala)

.. Respondent.

Indian Income-tax Act, (XI of 1922), section 25 (4)—Succession to business—Firm taxed under 1918 Act—Several businesses—Split up in 1939 and taken over by different firms—Whether amounts to discontinuance of business—Separated business taken over by composite firm—Subsequent a sale of entire undertaking to company—Whether amounts to succession to 1918 business—Whether entitled to tax relief.

A firm constituted with six partners carried on different businesses from 1902 onward. The firm paid income-tax under the Income-tax Act, 1918. Under the terms of partnership, death or retirement of a partner would not dissolve the firm. In 1922, one partner died and another retired, but the remaining partners continued the business, executing a fresh partnership deed. In 1933,

* C.As. Nos. 275 and 276 of 1953.

20th December, 1953.

1. (1961) S.C.J. 673:(1951) 1 M.L.J. (S.C.) 183:(1951) 1 An.W.R. (S.C.) 183.

another partner died, leaving the firm with only three partners. In 1939, the businesses were segregated and two partnerships were constituted under two deeds under which each firm carried on the business allotted to it. In 1943, the business carried on by the two new firms were brought under one composite firm, constituted under an instrument dated 30th October, 1955. Subsequently, on 7th February, 1948, the entire business of the composite firm was taken over as a going concern by a limited company. It was claimed that there was a succession from the composite firm to the limited company within the meaning of section 25 (4) of the Income-tax Act, 1922, and consequential tax reliefs were prayed for on that basis. The claim was rejected by the Income-tax Officer as well as the other Income-tax Authorities. On a Reference by the Appellate Tribunal, the High Court upheld the decision of the Income-tax Authorities. On appeal by Special Leave

Held, (per Sarkar and Shah, JJ.), (with Hidayatullah, J. dissenting)—That the business was discontinued in 1939 and what was subsequently carried on was not the same business. The person who transferred the business which caused the succession in 1948 was a single firm and this firm could not have been brought about by a change in the constitution of an existing firm, for there were two existing firms and they could not be deemed to be a single firm by simple changes in the constitution. The business which was subjected to tax in 1918 had been discontinued in 1939 and it was not in existence in 1948 so as to permit a succession to take place under the instrument dated 7th February, 1948.

Per Hidayatullah, J. (dissenting).—The identity of the entity was never lost and there was never a succession till the year 1948. The relief under section 25 (4), however, has to be allowed only in respect of the business in piece-goods, yarn and banking which alone had paid the tax under Income-tax Act of 1918.

Appeals by Special Leave from the Judgment and Order, dated 24th May, 1960 of the Kerala High Court in Income-tax Referred Case No. 98 of 1955 (M.).

S. T. Desai, Senior Advocate (C. V. Mahalingam and B. Parthasarathi, Advocates, and J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji & Co., with him), for Appellant.

K. N. Rajagopal Sastri, Senior Advocate (R. N. Sachithy, Advocate, with him), for Respondent.

The Court delivered the following Judgments—

Sarkar, J. (for himself and Shah J.)—These two appeals arise out of assessments of the appellant to income-tax for the years 1948-49 and 1949-50. The question in these appeals is whether on the facts to be presently stated, the appellant was entitled to relief under section 25 (4) of the Indian Income-tax Act, 1922.

The appellant claimed relief under section 25 (4) contending that it had transferred its business to a limited company with effect either from 13th November, 1947 or 13th February, 1948, by an instrument executed on 7th February, 1948. The claim was rejected by the Income-tax Officer and by the Appellate Assistant Commissioner and also by the Income-tax Appellate Tribunal on appeal to it. The appellant then moved the Tribunal to refer a certain question to the High Court at Madras under section 66 (1) of the Act but that application was rejected. It then moved the High Court under section 66 (2) of the Act and the High Court directed the Tribunal to refer the following question for determination by it :

“ Whether, on the facts and in the circumstances of the case, the assessee is not entitled to relief under section 25 (4) of the Indian Income-tax Act, and to what extent ? ”

The Tribunal duly drew up a statement of case and referred the question along with it to the High Court. There were really two References as there were two cases before the Tribunal. These however were heard together by the High Court and disposed of by one judgment. The High Court held that the appellant was not entitled to any relief under section 25 (4). The present appeals are from the judgment of the High Court.

The facts have to be stated at some length but before we do that we think it would be profitable to set out the statutory provisions concerned. Though we are directly concerned with sub-section (4) of section 25, a consideration of sub-section (3) of that section will throw useful light on the matter in question and so we set out both these sub-sections below :

Section 25.

(3) Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is discontinued, then, unless there has been a

succession by virtue of which the provisions of sub-section (4) have been rendered applicable no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance.....

(4) Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939 carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession.....

Both these sub-sections gave a further right to the assessee but with that right we are not concerned and shall, therefore, make no more reference to it.

Now it will be seen that under sub-section (3) the discontinuance of the business gave rise to a relief from taxation in respect of its income provided however that there had not been a succession to the business as mentioned in sub-section (4) which, as will later be seen, has to be a succession taking place after 1st April, 1939. The succession contemplated in sub-section (4) again must have taken place before the discontinuance for if the business is discontinued it ceases to exist and cannot be succeeded to.

Sub-section (4) requires certain conditions to be fulfilled before a claim to relief under it can be made. As the present appeals relate only to a business carried on by a firm, in discussing these conditions we will omit all references to the professions vocations and owners of businesses other than firms. We would like to remind here that a firm is a taxable unit under the Income-tax Act and it is a person as that word is used in the Act. Now the first condition of the applicability of sub-section (4) of section 25 is that the business must have been charged to tax under the Indian Income-tax Act, 1918. This Act was in force between 1918 and 1922 in which year it was replaced by the present Act. So the business must have been in existence sometime between 1918 and 1922. Under the Act of 1918 tax was assessed computed and levied on the income of the year of assessment but under the Act of 1922 the scheme of assessment of income and tax was modified. By that Act tax was assessed on the income of the previous year and the result of the innovation was that the income of the year 1921-22 was assessed twice once under the Act of 1918 and again under the Act of 1922 and it was because of this that relief was given by sub-sections (3) and (4) of section 25. The second condition of the applicability of section 25 (4) is that that business must have been carried on at the commencement of the Indian Income-tax (Amendment) Act, 1939, that is, 1st April, 1939, by the person claiming the relief. The third condition is that the person carrying on the business on 1st April, 1939, has to be succeeded by another person as the owner carrying on the business. Obviously, the succession indicated must have been after 1st April, 1939, as we have earlier stated, for a person carrying on a business on that date can only be succeeded in that business by another person on a date later than it. The fourth condition is that the succession is not merely a change in the constitution of the firm. This condition, of course, is applicable only where, as in the present case, the business was carried on by a firm.

The appellant who is the assessee in these cases, is a firm. It contends that it had been carrying on a business on 1st April, 1939 from before and on that business tax had been charged under the Act of 1918 and that it was succeeded by a company as owner of the business as a result of a transfer by an instrument executed on 7th February, 1948. The appellant further contends that its constitution has changed from time to time but the firm has never been dissolved so that it has been the same firm continuing and carrying on the same business from before 1918 till the transfer aforesaid. It is on this basis that it claimed the benefit of section 25 (4) of the Act.

We now proceed to set out the facts of the case in a chronological order. It appears that a firm bearing the same name as that of the appellant, that is, Sait (or Shah) Nagjee Purushotham Company was started in 1902 and was reconstituted by an agreement of partnership dated 6th December, 1918. On the last mentioned date it carried on business in piece-goods, yarn, and other articles at Calicut with branches in Madras and Bombay. It also subsequently started a business of manufacture

and sale of umbrellas but the precise date of the commencement of this business does not appear from the record. Sometime about 1932 it started another business of manufacture and sale of soap. For practical purposes the firm can be treated as having been constituted by this document of 6th December, 1918. The partnership agreement of 6th December, 1918, was between the following six persons, Purushotham, Nagjee, Narayanjee, Krishnaje, Maneklal and Bhagwanjee. Of these persons the last named was an outsider and the rest were members of a family. The agreement provided that the withdrawal of a partner for whatever reason, would not dissolve the partnership as between the remaining partners. Krishnaje died in 1933 and Bhagwanjee retired about that time. On 2nd January, 1934, the remaining four partners executed an instrument varying some of the terms of the agreement of 6th December, 1918. The instrument, however, provided that subject to the variations made the agreement of 6th December, 1918, was to remain effective. It is not in dispute that there was no dissolution of the firm by the instrument of 2nd January, 1934. Thereafter on 27th April, 1934, Purushotham died and the firm was then left with three partners, namely, Nagjee, Narayanjee and Maneklal.

Then we get two instruments both dated 30th May, 1939 each described as an agreement of partnership. One instrument, which is marked as Annexure C-I, was between Nagjee, Narayanjee, Maneklal and Hemchand. The other instrument, which is marked as Annexure C-II was between Nagjee, Narayanjee and Maneklal. It will be necessary to set out later some of the terms of these instruments, for on them a large part of the arguments advanced in these cases has turned. Briefly it may be stated here that the appellant contends that these agreements did not really create new partnerships dissolving the existing one. Its case is that under Annexure C-I an outsider Hemchand was admitted as partner in some of the businesses of the existing partnership, namely, the umbrella and soap businesses and by the other instrument, Annexure C-II, the other existing businesses of that partnership, e.g., in yarn, piece-goods, money-lending etc. were continued by the subsisting partners mentioned above. The contention of the respondent, on the other hand, is that these two instruments show that the business of the existing firm had been split up into two and transferred to two different owners, namely, two newly constituted firms with different partners, some of whom were no doubt common, and this amounted to a discontinuance of the business of the old firm. It was contended that after such discontinuance it could not be said that the same business on which tax had been charged under the Act of 1918 was being carried on on 1st April, 1939, and no question therefore, of any subsequent succession to that business to make sub-section (4) of section 25 applicable could arise.

We next have an instrument of 30th October, 1943, also styled an agreement of partnership, to which Narayanjee, Maneklal, Jayanand, Leeladhar and Prabhulal were parties. It refers to the two "agreements of partnership of 30th May, 1939" and certain retirements of partners and admission of new partners and provides that the parties to the instrument had agreed to carry on "as one single partnership" the businesses carried on previously by the two partnerships referred to in the instruments of 30th May, 1939. One of the contentions of the respondent is that even if it was not right in its view of the instruments of 30th May, 1939, this instrument of 30th October, 1943, clearly evidenced a dissolution of the partnership then existing and the creation of an entirely new partnership to which the business of the old firm was transferred. It was said that this was a succession to business within the meaning of sub-section (4) of section 25 and, therefore, the later succession, if any, by the transfer of 7th February, 1948, could not provide the basis for relief under section 25 (4). Whether relief could be granted under the earlier succession, it was said, is irrelevant for such relief had never been claimed.

The last instrument to which we have to refer is the agreement of 7th February, 1948 between Maneklal, Jayanand, Leeladhar and Prabhulal as partners of the appellant firm and a limited company formed to take over the business of the firm. By this instrument the parties agreed that the business of the firm would be transferred to the company with effect from 13th November, 1947, the transfer to be completed

on 13th February, 1948, by payment of the consideration of Rs. 4 lacs by the vendee and delivery of possession of the assets of the business by the vendor. It is on this instrument that the appellant, which is the firm constituted by Maneklal, Jayanand, Leeladhar and Prabhulal, claimed relief under section 25 (4) in its assessment for the years 1948-49 and 1949-50.

There is no doubt that as a result of the instrument of 7th February, 1948, the company succeeded to the business that was being carried on by the firm of Nagjee, Purushotham & Company as then constituted as aforesaid, as bankers, piece-goods and yarn merchants and as soap and umbrella manufacturers and sellers. The question however is was this firm a firm which had been carrying on a business on 1st April, 1939, and which business had been charged to tax, under the Act of 1918? The High Court took the view that it was not and we think, that that view is correct. In our opinion, the business was discontinued in 1937 and what was subsequently carried on was not the same business.

We now turn to Annexures C-I and C-II dated 30th May, 1939. Taking Annexure C-I first, the material portions of this document are as follows :

"This agreement of Partnership.....between (1) Nagjee..... (2) Narayanjee (3) Maneklal..... and (4) Hemchand.....(hereinafter called the partners) witnesseth as follows :

Whereas Partners 1 to 4 have been carrying on a business as partners from the beginning of Samvat 1994 (October-November, 1937) in the manufacture and sale of soaps under the name of the 'Vegetable Soap Works' Proprietor Sait Nagjee Purushotham & Co., and in the manufacture and sale of umbrellas in Calicut with branches at Madras and Bombay under the name and style of Sait Nagjee Purushotham & Co., Soap and Umbrella Merchants at Calicut and Madras and in the name of Sha Nagjee Purushotham & Co., at Bombay hereinafter called the Firm ;

And whereas it is thought advisable to reduce the terms of the said partnership into writing for the proper and better conduct of the business ;

The Partners have agreed and also hereby agree to the following.....

(1) The Firm shall continue to be as of old namely Sait Nagjee Purushotham & Co., Soap and Umbrella Merchants. The Firm shall continue to do business in the manufacture and sale of soaps under the name of the 'Vegetable Soap Works' and in umbrellas under the name of Sait Nagjee Purushotham & Co., Soap and Umbrella Merchants as aforesaid with Head Office at Calicut and branch at Madras under the same name and branch at Bombay under the name of 'Sha Nagjee Purushotham & Co.

* * * * *

(4) The business of the Firm shall consist mainly in the manufacture and sale of soaps and umbrellas and such allied products and such other articles as all the partners or the majority of them may agree.

* * * * *

(6) It is always understood by the Partners herein that the Firm of Sait Nagjee Purushotham & Co., Bankers, Piece-goods and Yarn merchants, Calicut, the partners whereof are the Partners, 1 to 3 herein shall advance as heretofore all funds that are necessary for the conduct of this PartnershipSuch advances shall be deemed as loan by the firm of Sait Nagjee Purushotham & Co., Bankers, Piece-goods and Yarn Merchants to the Firm.....

(9) Until otherwise determined by Partners Nos. 1, 2 and 3 in writing the Partnership shall not borrow any amount from any one other than the Firm Sait Nagjee Purushotham & Co., Bankers Piece-goods and Yarn merchants referred to in para. 8 above.

* * * * *

(25) All the Partners hereby agree that Partners 1 to 3 herein are the Partners of the Firm of Sait Nagjee Purushotham & Co., Bankers, Piece-goods and Yarn merchants, Calicut."

We now set out the material portions of Annexure C-II :

"This agreement of partnership.....between (1) Nagjee..... (2) Narayanjee.....and Maneklal.....hereinafter called the Partners witnesseth as follows :

Whereas under the Agreement of Partnership dated the 6th day of December, 1918..... (1) Purushotham..... (2) Nagjee..... (3) Narayanjee..... (4) Karsanjee..... (5) Bhag-

vanjee..... (6) Maneklal..... have carried on a partnership trade in Piece-goods, Banking and other articles in Calicut with branches at Madras and Bombay, and

Whereas (1) Purushotham..... (2) Karsanjee and..... (3) Bhagvanjee ceased to be partners either by retirement or death; and

Whereas the remaining partners (1) Nagjee..... (2) Narayanjee..... and (3) Maneklal..... settled the claims in full of the partners who ceased to exist and agreed to carry on and continue and are continuing the existing partnership business under the name and style of 'Sait Nagjee Purushotham & Co.', Bankers, Piece-goods and Yarn Merchants, hereinafter called the 'Firm'; and

Whereas it is thought advisable and prudent to reduce into writing the terms and conditions agreed upon orally by them the Partners agree and have agreed to the following terms and regulations stipulated hereunder.

* * * * *

(2) The Agreement of partnership dated the 6th day of December, 1918, is hereby revoked and the affairs of the Firm shall be regulated and governed by the Regulations agreed upon orally and reduced into writing in this Deed and the terms and conditions of the revoked deed shall not in future apply to the 'Firms' except such as have been repeated in this Deed.

* * * * *

(20) All the partners hereby agree that they in their individual capacity are and shall be Partners also along with Hemchand Veerjee Sait in a Partnership business in Soaps and Umbrellas carried on in Calicut and Madras under the name and style of Sait Nagjee Purushotham & Co., Soap and Umbrella Merchants and in Bombay under the name and style of Shah Nagjee Purushotham & Co., the terms and conditions whereof are embodied in an Agreement of Partnership dated 30th May, 1939, signed by all the Partners."

It is clear that these two instruments recite events which had happened in 1937. Annexure C-I. shows that in October/November of that year a new partnership was started to do business of manufacture and sale of soap and umbrella between Hemraj and the remaining partners of the pre-existing firm of the same name, that is, Nagjee, Narayanjee and Maneklal. This is clear from the terms of the instrument which we have earlier set out. We think it right especially to draw attention to the terms of clauses (8), (9) and (25) of Annexure C-I. These indicate that there were two firms, namely, one, of which the constitution appeared from Annexure C-I and which carried on umbrella and soap businesses and the other, consisting of Nagjee, Narayanjee and Maneklal carrying on other kinds of businesses the constitution of which appeared from Annexure C-II. Clauses (8) and (9) show that one firm was to lend money to the other. Such an agreement could not of course have been made unless the two firms were separate. By clause (25) all the parties to Annexure C-I agreed that the firm constituted by Nagjee, Narayanjee and Maneklal was a different firm.

Learned Counsel relied on clause (1) of Annexure C-I and contended that it provided for the continuance of the old firm, that is, the firm constituted by the instrument of 6th December, 1918, and hence no new firm had been created. We think that this contention is without foundation. There is no reference in Annexure C-I to the firm constituted by the instrument of 6th December, 1918. The word "firm" in Annexure C-I refers to the partnership brought into existence by it. Clause (1) says that "The Firm shall continue to be as of old". The word "old" refers to the partnership orally brought into existence in October/November, 1937 to which reference is made in the first recital and to put down the terms of which in writing, Annexure C-I was executed. Likewise the provision in clause (1) that "The Firm shall continue to do business" refers to the continuance of the business carried on prior to 30th May, 1939, by the firm brought into existence in October/November, 1937 by the oral agreement. The continuance cannot be a continuance of the firm or business of the partnership of 1918 for Annexure C-I makes no reference to that partnership at all. It may be that the partnership of 1918 was carried on in the same name as the firm referred to in Annexure C-I but we are not aware that an identity of names establishes that the two firms are same. It seems to us beyond question that the partnership mentioned in Annexure C-I is different from the partnership which was brought about by the instrument of 6th December, 1918, for the partners in the two firms were not the same. It has not been shown to us, neither do we think, that where different groups of persons, some of whom are common, carry

on different businesses under different agreements, they can form one partnership. Further, as clearly appears from Annexure C-II, the firm brought into existence by the 1918 instrument was dissolved and a new firm was started between Nagjee, Narayanjee and Maneklal after the retirement of Purushotham in 1934. If the 1918 firm was thus dissolved it could not, of course, be continued. So the firm created by Annexure C-I could not have been a continuation of the 1918 partnership. Therefore, the firm mentioned in Annexure C-I is a new firm and not the old 1918 firm reconstituted.

This position is reinforced by the terms of Annexure C-II. First it is called an agreement of partnership, that is, agreement creating a partnership. The recital provides that the remaining partners of the firm, constituted by the instrument of 1918 agreed to carry on and continue the existing partnership business. Clause (2) states that the deed of 6th December, 1918, is revoked and the affairs of the firm would be governed by the terms of Annexure C-II and the conditions of the revoked deed were not to apply. It is impossible after this to say that the partnership constituted by the instrument of 6th December, 1918, was not dissolved. There is no warrant for the view for which the appellant contended, that only the terms on which the business under the document of 6th December, 1918, was carried were revoked and not the head agreement to do business in partnership. The fact that an express agreement to carry on the business in partnership was made (for which see the third recital in Annexure C-II) further indicate that the agreement to that effect in the instrument of 6th December, 1918, was no longer subsisting. In this case the terms providing for the continuance must refer to the continuance of the business and not to the continuance of the partnership agreement because that was expressly revoked. If this is not the correct view, then clause (20) would be inexplicable. That clause states that the partners in their individual capacity would be partners with Hemchand in another business the terms of which partnership appear in another partnership agreement of the same date and which is Annexure C-I. This would show that the old partnership of 1918 had given up doing some of its existing businesses and it was decided to carry them on under a new partnership agreement. This would support the view that the old partnership was dissolved for it would not have otherwise given up those businesses.

The two instruments Annexures C-I, and C-II, therefore, clearly establish that in October/November, 1937, the business that was carried on by the firm of Sait Nagjee Purushotham & Co. till that date was discontinued and its businesses were split up into two and carried on by two independent partnerships then brought into existence. When this happens it is impossible to say that the pre-existing business was continued. This view finds support from *S. N. A. S. A. Annamalai Chettiar v. Commissioner of Income-tax, Madras*¹, where it was held that when a business carried on in one unit is disintegrated and divided into parts, the parts are not the whole even though all the parts taken together constitute the whole. That was a case of a joint family business which on partition was split up between different members of the family. It was held that as a result of this splitting up there was a discontinuance of the original business at the date of the partition and on such discontinuance the family became entitled to relief under section 25 (3). It is of some significance to point out that the partners constituting the appellant at the moment of the transfer in 1948 also thought that in 1937 the old firm ceased to exist and its business was carried on thereafter by two independent firms, for the document of 30th October, 1943, has referred to Annexures C-I and C-II as constituting two independent partnerships and proceed to revoke them both and provided that the parties to the instrument "have agreed to carry on and continue as one single partnership business the existing partnership businesses for Sait Nagjee Purushotham & Co., Bankers, Piece-goods and Yarn Merchants, Sait Nagjee Purushotham & Co., Soap and Umbrella Merchants."

Now when the business on which tax was charged under the Act of 1918—which, it is not disputed, happened in this case—was discontinued in 1937 it could not have been carried on on 1st April, 1939. What was then carried on must have been some

other business. So one of the conditions on which relief under section 25 (4) of the Act could be claimed was not satisfied and the claim would not be maintainable.

Further more, for the reasons earlier stated, it must be held that on 1st April, 1939, the business, assuming its identity to have continued in spite of the splitting up, was being carried on by two persons, namely, two firms with different partners. Now the person who transferred the business which caused the succession in 1948 on which the appellant relies for relief under section 25 (4) was a single firm. This latter firm could not have been brought about by a change in the constitution of an existing firm, for there were two existing firms and they could not become one by simple changes in their constitution. Indeed the instrument of 30th October, 1943, which brought the transferee firm, the appellant before us, into existence, expressly states that "The Agreements of Partnerships, dated 30th May, 1939.....are hereby revoked." It follows that at the date succession relied upon can be said to have taken place, the business was being carried on by a person different from those who carried it on on 1st April, 1939. So another condition of the applicability of section 25 (4) of the Act is not satisfied. The claim for relief under that section must fail on this ground also.

If it were to be said that the partnerships were brought into existence on 30th May, 1939, by Annexures C-I and C-II instead of in October/November, 1937 then also the appellant's claim must fail. Whenever the new partnerships were brought into existence, the result would, in our view, necessarily be that the business of the old partnership which was taken over by the two new firms must be deemed to have been discontinued. On the principle stated in *Annamalai Chettiar case*¹, there could not in such a case be succession of a business from one to another. That being so, there can be no question of the succession to business carried on at the commencement of the Indian Income-tax (Amendment) Act, 1939 i.e., 1st April, 1939 and on which tax was charged under the Act of 1918 having taken place in 1948 as claimed by the appellant. What was discontinued could not be succeeded to. Even if it was held that on 30th May, 1939, there was a succession to the business which we do not think is a correct view to take, that also would disentitle the appellant to relief under sub-section (4) of section 25 in the years 1948-49 and 1949-50, for it should, in such an event, have claimed the relief in the year 1939-40.

In the result we have come to the conclusion that the business which had been subjected to tax in 1918 had been discontinued in October/November, 1937 or on 30th May, 1939 and it was not in existence in 1948 so as to permit a succession to it taking place under instrument of 7th February, 1948. The appeals, therefore, fail and they are accordingly dismissed with costs.

Hidayatullah, J.—I have had the advantage of reading the judgment just delivered by my learned brother Sarkar, J., but I have the misfortune to disagree with him in his conclusion that these appeals must be dismissed. In my judgment, these appeals must be allowed. The facts have been set out in detail by my learned brother and I shall content myself with repeating only such facts as are necessary for the elucidation of my point of view.

The appellant is a firm which in 1948 consisted of four partners namely Maneklal Purushotham Liladhar, Narayanjee Jayanand Nagjee and Prabhulal Naranji. It was carrying on business mainly in piece-goods, yarn, banking and manufacture and sale of umbrellas and soaps. Its Head Office was at Calicut but it had branches at Bombay and Madras. The history of the firm goes back to the year 1902. In that year, five members of a family by name Purushotham, Nagjee, Narayanjee, Krishnagjee and Premchand along with one stranger Bhagvanjee started the appellant firm Sait Nagjee Purushotham & Co., Thereafter there were changes in the constitution of the firm caused by the death or by the retirement of partners. Of the original partners Premchand retired in 1912 and another member of the family Maneklal was taken in his place. In 1933 and 1934, two members

(Krishnaje and Purushotham) died and Bhagwanjee retired. In that year, the firm consisted of Nagjee, Narayanjee, and Maneklal who were members of the original family. We have on the record the partnership deed of 6th December, 1918 by which the shares of the partners were adjusted after the retirement of Premchand and the admission of Maneklal and a deed of 1st January, 1934 after the death of Krishnaje and retirement of Bhagwanjee. In the deed of 1918, it was stated that this firm carried of business in Calicut, having branches at Madras and Bombay and though Maneklal was included as a new partner, the firm was to carry on and continue the existing partnership business under the same name and style. By the deed of 1918, the earlier partnership deed of 4th April, 1902 was revoked and the affairs of the firm were to be regulated by the new deed. It was, however, provided, that the withdrawal or death of a partner would not cause a dissolution of the partnership. When the deed of 1934 was entered into, the deed of 1918 was not revoked but only amended; it was however, provided that the principal deed of partnership—to wit of 1918—would remain in force in so far as it was not inconsistent.

Sometime in the year 1932 or thereabout, the firm had started the manufacture and sale of soaps under the name of "The Vegetable Soap Works", Proprietors Sait Nagjee Purushotham & Co., and perhaps the manufacture and sale of umbrellas in Calicut with branches at Madras and Bombay under the name and style, at Calicut and Madras of "Sait Nagjee Purushotham & Co., Soap and Umbrella Merchants", and at Bombay of "Shah Nagjee Purushotham & Co." It may be pointed out that the words "Sha" and "Sait" mean the same thing, and the names were not different.

In 1937, one Hemchand a stranger to the family was admitted as a working partner. On 30th May 1939, two deeds were executed. They are respectively marked C-1. and C-2. C-1 was executed by Nagjee, Narayanjee, Maneklal and Hemchand. C-2 was executed by Nagjee Narayanjee and Maneklal. In C-1 the preamble was as follows :

"Whereas Partners 1 to 4 have been carrying on a business as partners from the beginning of Samvat 1994 (Guzarathi Era) in the manufacture and sale of Soaps under the name of "The Vegetable Soap Works" Proprietors Sait Nagjee Purushotham & Co., and in the manufacture and sale of Umbrellas in Calicut with branches at Madras and Bombay under the name and style of Sait Nagjee Purushotham & Co. Soap and Umbrella Merchants at Calicut and Madras and in the name of Shah Nagjee Purushotham & Co., at Bombay hereinafter called the Firm";

The terms relevant to our purpose were :

"(1) The Firm shall continue to be as of old namely Sait Nagjee Purushotham & Co., Soap and Umbrella Merchants. The Firm shall continue to do business in the manufacture and sale of soap under the name of the "Vegetable Soap Works" and in umbrellas under the name of "Sait Nagjee Purushotham & Co." Soap and Umbrella Merchants as aforesaid with Head Office at Calicut and branch at Madras under the same name and branch at Bombay under the name of "Shah Nagjee Purushotham & Co."

(2) "The business of the Firm shall be carried on by Partner No. 4 Hemchand Virjee Sait according to the directions of Partners 1 to 3 and the said Hemchand Virjee Sait is to manage work and assist the business of the Firm and he shall be called hereinafter the Working Partner ;"

(14) "The working partner Hemchand Virjee Sait may draw on the Firm for each month the monthly sum of Rs. 400 only from out of the Firm's account on account of the share of his profits for the current year, but if on taking the annual account it shall appear that the monthly sums drawn out by him exceed his share of profits he shall forthwith refund the excess."

(15) "The Profits and Losses shall be divided and apportioned in the following proportion : Partner No. 1 shall have 3 annas 8 pies in the Rupee ; Partner No. 2 shall have 3 annas and 8 pies in the Rupee ; Partner No. 3 shall have 3 annas 8 pies in the Rupee ; and Partner No. 4 shall have 5 annas in the Rupee. On taking the accounts if it is found that the Firm has incurred a loss the aggregate of the monthly sums drawn by the Working Partner shall at once be refunded by the Working Partner to the Firm along with his share of the loss."

(17) "It is hereby agreed that the Working Partner should invest a sum of Rs. 15,000 as deposit in the Firm of Sait Nagjee Purushotham & Co., Bankers, Piece Goods and Yarn Merchants, Calicut and such money shall remain in deposit as long as he remains a Partner and such amount shall carry interest at such rates of interest as the Firm of Sait Nagjee Purushotham & Co., Bankers, Piece Goods and Yarn Merchants may agree from time to time."

In C-2 the preamble was :

Whereas the remaining partners (1) Nagjee Amersee Sait, (2) Narayanji Purushotham Sait and (3) Maneklal Purushotham Sait settled the claims in full of the partners who ceased to exist and agreed to carry on and continue and are continuing the existing partnership business under the name and style of "Sait Nagjee Purushotham & Co." Bankers Piece Goods and Yarn Merchants hereinafter called the "FIRM";

The relevant terms were :

(2) "The Agreement of Partnership dated the 6th day of December, 1918 is hereby revoked and the affairs of the Firm shall be regulated and governed by the Regulations agreed upon orally and reduced into writing in this Deed and the terms and conditions of the revoked deed shall not in future apply to the "Firm" except such as have been repeated in this Deed."

(20) "All the partners hereby agree that they in their individual capacity are and shall be Partners also along with Hemchand Veerji Sait in a Partnership business in Soaps and Umbrellas carried on in Calicut and Madras under the name and style of Sait Nagjee Purushotham & Co., Soap and Umbrella Merchants and in Bombay under the name and style of Shah Nagjee Purushotham & Co., the terms and conditions whereof are embodied in an Agreement of Partnership dated 30th May, 1939, signed by all the Partners."

Both deeds provided again that the partnerships would not be dissolved by the death or retirement of a partner.

Nagjee died in August, 1943, and Hemchand retired on 31st October 1943. On 30th October 1943, a fresh deed of partnership was executed by Narayanjee and Maneklal who were continuing as partners from 1918 and two other members of the family namely Liladhar and Prabhulal and to the benefits of partnership Jayanand Nagjee who was a minor, was admitted. The preamble was as follows :

And whereas partner No. 4 Hemchand Veerji Sait has decided to retire from the said partnership business as from 30th October, 1943.

And whereas the remaining partners are willing and have agreed to take as new partners Leeladhar Narayanji Sait and Prabhulal Narayanji Sait, sons of Narayanji Purushotham Sait as from 31st October, 1943.

And whereas the remaining partners along with the new partners now included in the Deed of Partnership, have agreed to carry on and continue as one single partnership business, the existing partnership businesses of "Sait Nagjee Purushotham & Co.", Bankers, Piece Goods and Yarn Merchants, "Sait Nagjee Purushotham & Co., Soap and Umbrella merchants".

And whereas it is thought advisable and prudent to reduce into writing the terms and conditions agreed upon orally by them the partners agree and have agreed to the following terms and conditions stipulated hereunder :—

The operative terms relevant to our purposes were the following :

"The Agreement of partnership dated 30th May, 1939 entered into by (1) Nagjee Amersee Sait (2) Narayanji Purushotham Sait (3) Maneklal Purushotham Sait and (4) Hemchand Veerji Sait and registered as 98 and 97 in the Joint II Sub-Registrar's Office, Calicut respectively, are hereby revoked and the affairs of the firm shall be regulated and governed by the regulations agreed upon orally and reduced into writing in this Deed of Partnership; and the terms and conditions of the revoked Deed shall not in future apply to the Firm except such as have been repeated in this Deed.

1. The Firm name shall be "Sait Nagjee Purushotham & Co., Bankers, Piece Goods, Yarn, Soap and Umbrella merchants.

2. The partners of the Firm are (1) Narayanji Purushotham Sait, (2) Maneklal Purushotham Sait, (3) Jayanand Nagjee Sait (minor) represented by guardian Maneklal Purushotham Sait (4) Leeladhar Narayanji Sait and (5) Prabhulal Narayanji Sait."

The rest of the terms followed the same pattern as before.

In 1948, a limited liability company was formed under the name of Sait Nagjee Purushotham & Co., Ltd., and an agreement was made by which Sait Nagjee Purushotham & Co., represented by the then partners Maneklal, Liladhar, Jayanand and Prabhulal sold to the company the goodwill, assets etc. of the firm. The question in this case is whether the appellant firm was entitled to the benefits of section 25(4) of the Income-tax Act and if so, to what extent. The answer to the question depends on (a) whether the business on which tax was paid under the provisions of the Indian Income-tax Act, 1918 had discontinued at any time before 1948 or (b) whether there

was a succession by another person for the person who was carrying on business on 1st April, 1939. My learned brethren consider that there was a discontinuance in 1937/39 of the original business by reason of the division, of the original business into two divisions and the admission of Hemchand as a partner in one of the divisions. The Department as respondent contends that there was a succession in 1939 and again in 1943, because in those years a different person succeeded to the person carrying on business on 1st April, 1939. The contention of the Department has so far succeeded and I need not give the details of the decisions of the various Tribunals under the Indian Income-tax Act and the High Court, because my learned brother's judgment gives all such details. I shall therefore address myself to the questions (a) whether there was a succession in 1948 for the first time when the company succeeded the firm, to entitle the firm to the benefits of section 25 (4); (b) whether there was, prior to 1948, a discontinuance of the business on which tax was charged under the provisions of the Indian Income-tax Act and (c) whether there was, prior to 1948, succession by another person to the person who had paid the tax under the provisions of the Income-tax Act, 1918 after 1st April, 1939? If the answers to (b) and (c) be in the negative, (a) must be answered in the affirmative, but if the answer to either (b) or (c) be in the affirmative, (a) must be answered in the negative.

It is necessary at this stage to read section 25 which deals with assessment in case of discontinued business. The first two sub-sections deal with cases to which sub-section (3) is not applicable. The first sub-section lays down how the business is to be assessed when it is discontinued in any year and sub-section (2) provides that any person discontinuing business must give a notice on pain of a penalty. We are not concerned with these sub-sections. Sub-section (3) and sub-section (4) in so far as it is relevant for our purpose, are as follows :

Sub-section (3). "Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918 (VII of 1918), is discontinued, *then unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable* no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and the gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

Sub-section (4).—"Where the person who was at the commencement of the Indian Income tax (Amendment) Act, 1939 (VII of 1939), carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous years exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference :

Provided....."

Sub-section (4) was inserted by the Indian Income-tax (Amendment) Act, 1939 (VII of 1939), which also introduced the words italicised in sub-section (3). Sub-section (4) and the amendment to sub-section (3) were to come into force from 1st April, 1939 by virtue of Notification No. 7 of the Central Government dated 18th March, 1939. Under section 3 of the Indian Income-tax Act, 1918, the subject of the tax was not the income of the previous year of assessment, but the income of the assessment year. By the Act of 1922, a change was introduced and the tax was payable on the income of the previous year in the following year which was the year of assessment. Any business which was in existence and earning profits in the year 1921 and continued in the year 1922 was required to pay tax on its profits of 1921, once under the Act of 1918 and again under the Act of 1922. In the 1922 Act, a provision was made to give relief to any business which had paid such double tax when it discontinued business. When the 1939 amendment was made, relief was given by sub-section (4) to

a person who had paid tax under the Act of 1918 when he was succeeded in his business by another person. It will, however, be noticed that the two sub-sections were mutually exclusive. If there was a succession, then, sub-section (4) was applicable. Sub-section (3) was only applicable when the business was discontinued. It will further be noticed that the term "succession" was not to include a change in the constitution of a partnership. In this case, the claim to the benefit of sub-section (4) was made by the company on the basis of a succession either on 13th November, 1947 or on 13th February, 1949. The Income-tax Officer held that a succession had taken place in 1943 when on the retirement of Hemchand, the two separate businesses formed under Exhibit C-1 and C-2 were amalgamated. The Appellate Assistant Commissioner agreed with this conclusion. The Tribunal also held that the business in soap and umbrella was different from the business of banking, piece-goods and yarn, and the amalgamation of these two businesses in 1943 amounted to a succession by a newly constituted firm. The High Court held on Reference that *the firm* constituted under the deed of 1918 was dissolved in 1939 and *the firms* constituted under the two deeds of 1939 were dissolved in 1943. The High Court, therefore, held that succession had taken place in 1939 and again in 1943 and the claim on the basis of the transfer to the limited liability company in 1948 was too late. In coming to the conclusion that the firm constituted under the deed of 1918 was dissolved, the High Court relied upon Clause (2) of the deed Exhibit C-2.

The two sub-sections which have been quoted apply differently, because in sub-section (3) the emphasis is on the discontinuance of *the business* which had paid tax under the 1918 Act while the emphasis in sub-section (4) is on a succession to *a person* who, on 1st April, 1939, was carrying on *any business* on which tax was at any time charged under the Act of 1918. The former regards the *continuity of the business* which had paid tax under the Act of 1918 and the latter the *continuance of the person* who, on 1st April, 1939, was carrying on *the business which had paid such tax*. There cannot, therefore, be a case in which both the sub-sections apply at the same time, because the intention is obviously to keep them separate and when sub-section (4) was added, sub-section (3) was amended by the addition of the words "unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable." The main idea is the continuance of business unless there has been a succession. The question that arises is whether there was at any time a dissolution of the partnership and if so, whether it amounted to "discontinuance" of business for the application of sub-section (3) or a succession by the formation of an entirely new firm for the application of sub-section (4). For this purpose, I shall first discuss what is the position of a partnership and under the Income-tax Act. At the outset, I must draw attention to a few fundamental facts. It was pointed out by this Court in *Charandas v. Haridas*¹, that those whose duty it is to apply the provisions of the Income-tax Act must bear in mind that what may be the resulting position under the law of partnership under the ordinary law of partnership and or the Hindu Law is not necessarily the resulting position under the Income-tax Act. This case is another example of the difference of approach to the same facts under the Law of Partnership and the Income-tax Law.

In *Dulichand v. The Commissioner of Income-tax, Nagpur*², it was pointed out by this Court that commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation, that is as a body distinct from the members composing it, and such a separate existence has been recognised under the Scottish law. But under the English Common Law, a firm is not regarded as a separate entity from the members composing it. The Indian Partnership Act has accepted the English Common Law though mercantile usages have crept into business accountancy and the Civil Procedure Code allows a firm to sue or be sued in the firm's name provided the names of partners are disclosed. Under the Income-tax Act, however, a firm is by section 3 made a unit of assessment, but this personality

1. (1950) 2 S.C.J. 929 : (1950) 3 S.C.R. 295 : 62 Bom.L.R. 910 : 39 I.T.R. 202. 2. (1956) S.C.J. 317 : (1956) 1 M.L.J. 164 : (1956) S.C.R. 154 : 29 I.T.R. 535.

does not make the firm a person in every sense of the word. It only makes it an assessable unit. A firm is not a "person" and cannot enter into partnership with an individual, with another firm or with a Hindu Undivided family.

Section 26 recognises the existence of a firm as an assessable unit and provides for taxation in the event of changes in the constitution of firms. The first sub-section deals with a change in the constitution of the firm or where a firm has been newly constituted and the second sub-section where there is a succession to the person (which includes a firm) by another person. This sub-section deals with all cases of succession except those dealt with under sub-section (4) of section 25 already set out. Section 25 provides for discontinuance of business. Discontinuance is thus not a mere change in the constitution of the firm nor even succession where though the business changes hands, the business itself is carried on. It was recently pointed out by us in *Shivram Poddar v. Income-tax Officer, Calcutta and another*¹, thus :

"Under the ordinary law governing partnerships, modification in the constitution of the firm in the absence of a special agreement to the contrary amounts to dissolution of the firm and reconstitution thereof, a firm at Common Law being a group of individuals who have agreed to share the profits of a business carried on by all or any of them acting for all and supersession of the agreement brings about an end of the relation. But the Income-tax Act recognises a firm for purposes of assessment as a unit independent of the partners constituting it, it invests the firm with a personality which survives reconstitution. A firm discontinuing its business may be assessed in the manner provided by section 25 (1) in the year of account in which it discontinues its business ; it may also be assessed in the year of assessment. In either case it is the assessment of the income of the firm. Where the firm is dissolved but the business is not discontinued, there being change in the constitution of the firm, assessment has to be made under section 26 (1), and if there be succession to the business assessment has to be made under section 26 (2)."

Therefore when in sub-section (4) the word 'person' is used, it is intended to include not only an individual but also a firm. This is also clear from the words "not being merely a change in the constitution of a partnership". Since the Income-tax Act assesses a partnership as a unit and such units, must in the past, have been assessed to tax under the Act of 1918, sub-section (4) allows a partnership to obtain the benefits of sub-section (4) when there is a succession and a partnership does not lose this benefit if there has been a mere change in the constitution of the partnership without there being a succession. The business, if it continues, obtains a similar benefit when it is discontinued. In this way all cases of discontinuance of business are treated under the third sub-section and all cases of succession under the fourth sub-section and all cases of mere change in the constitution of the firm are neither cases under the third nor under the fourth sub-sections.

In this case, we have, therefore, to find out firstly what is meant by discontinuance of a business. Next, we have to find out what is comprehended within the expression a change in the constitution of a partnership. It is only if there was a discontinuance of the business before 1948 or a succession not amounting to a mere change in the constitution of the partnership between 1939 and 1948 that the appellants can be denied the benefit of section 25. The expressions, that is to say, "discontinuance" and "succession not amounting to a change of the constitution of a firm" have received exposition in the past. It is hardly necessary to refer to the large number of cases in which the matter has been discussed, because the leading case on the subject of discontinuance is *Commissioner of Income-tax, Bombay v. P. E. Polson*², and on the subject of succession *Commissioner of Income-tax, West Bengal v. A. W. Figgies & Co.*³. It will be sufficient to refer to these two cases.

To begin with, it must be remembered that the soap business commenced in the year 1932 and did not pay tax under the Act of 1918. Though there is nothing to show when the umbrella business commenced, it is almost certain that it did not pay tax under the Act of 1918. In any event the burden was on the assessee firm to prove this before claiming relief. These facts are fundamental, because, if the

1. Since reported in (1964) 1 S.C.J. 434 : 13 I.T.R. 364.
(1964) 1 I.T.J. 476 (S.C.).

2. (1953) S.C.J. 635 : A.I.R. (1963) S.C. 455 : 24 I.T.R. 405; (1954) S.C.R. 171.
L.R. 72 I.A. 196 : I.L.R. (1945) Bom. 455 : 24 I.T.R. 405; (1954) S.C.R. 171.
3. 938 : 47 Bom.L.R. 737 : (1945) 2 M.L.J. 231 :

umbrella and soap business were never assessed to tax under the Act of 1918, they are out of the picture and in respect of these businesses, the assessee firm was not at all entitled to relief. Section 25 (3) and (4) do not apply where the business was not in existence before the Act of 1922 came into force. A clear authority for this proposition is to be found in the decision of the Bombay High Court in *Ambalal Himatlal v. Commissioner of Income-tax and Excess Profits Tax, Bombay North*¹. In that case, a Hindu Undivided family was carrying on three separate businesses, namely money-lending, running a ginning factory and a share business. This family disrupted in 1943 and divided the business among its members, and claimed the benefit of section 25 (4) in respect of all the three businesses. It was found that only the money-lending business had paid tax under the Indian Income-tax Act, 1918. It was held by Chagla, C.J., and Tendolkar, J., that the assessee was entitled to the benefit mentioned in section 25 (4) only in respect of the money-lending business. Chief Justice Chagla observed at page 287 thus :

"But before us we have a clear and categorical finding that the three businesses of the assessee were distinct businesses and, therefore, it cannot be stated that the relief which was intended for the money-lending business which was carried on by the assessee and which was subjected to tax under the Act of 1918 should be extended to the business of running the ginning factory and the share business which were not in existence and which were not subjected to tax under the Act of 1918. The answer, therefore, to the question put to us will be that the assessee is entitled to the benefit mentioned in section 25 (4) only in respect of the money-lending business."

No finding in the present case is necessary, because the clear fact is that the soap business was not even in contemplation, much less in existence before 1922 and the same is true of the umbrella business also. The relief could therefore be claimed only in respect of the remaining businesses namely in piece-goods' yarn and banking which were started in 1902 and which admittedly continued without break till 1948. Since no claim in respect of the business of umbrellas and soaps could at all be entertained, any dealing with that part of the business by the assessee firm would not affect the questions in this case. Indeed the agreement to separate the umbrella and soap business when Hemchand was admitted as a partner in 1939 was in keeping with the continuance of the original business as an entity by itself and emphasised its separate character. From the record it appears that the old and the new businesses were also separately assessed. It is only this one entity to which the provisions of section 25 must be applied and in respect of which it must be considered whether there was a discontinuance or a succession at an earlier period.

I shall first examine the question of discontinuance. The Judicial Committee in *Polson's Case*², considered what was the meaning of the word "discontinuance". In that case, Polson who was carrying on business assigned it to a limited company on 1st January, 1939. He had paid tax in respect of the business under the Act of 1918. In the assessment year 1939-40 he claimed that in view of the provisions of section 25 (3) of the Act of 1922, as amended in 1939, his income from the business made during the year 1938 was not taxable. It was held that he was not entitled to the benefit of section 25 (3) as the business was not discontinued. The High Court of Bombay upheld the contention of Polson but the Privy Council reversed the decision approving the decision of the Madras High Court in *Meyyappa v. Commissioner of Income-tax, Madras*³. Lord Simonds pointed out that on 1st January 1939, Polson had ceased to be the owner of the business and therefore he was not carrying it on "at the commencement of" the amending Act. Since those words meant the date when the Act came into force on 1st April, 1939, they could not be carried back to a date anterior to 1st April, 1939; and on that date Polson ceased to be the owner of the business. As regards the words "discontinued" and "discontinuance" in section 25 Lord Simonds pointed out that they had been the subject of numerous decisions and that it had been uniformly decided that the words did not cover a mere change of ownership but referred only to *complete cessation of the business*. Lord Simonds further observed

1. I.L.R. (1952) Bom. 373 : A.I.R. 1951 Bom. 428 : 58 Bom.L.R. 610 : 20 I.T.R. 260 (287).
 2. (1945) 2 M.L.J. 231 : L.R. 72 I.A. 196 : I.L.R. (1945) Bom. 938 : 47 Bom.L.R. 737 : 13 I.T.R. 364.
 3. (1943) 2 M.L.J. 8 : 11 I.T.R. 247 : I.L.R. (1944) Mad. 165.

"Their Lordships entertain no doubt of the correctness of these decisions, which appear to be in accord with the plain meaning of the section and to be in line with similar decisions upon the English Income-tax Acts."

It would therefore follow that by discontinuance in sub-section (3) is meant complete cessation of the business. This cannot be said to have taken place in the present case in respect of all the businesses and *a fortiori* in respect of the business in piece goods, yarn and banking. These businesses might have been managed by persons other than those who had paid the tax under the Act of 1918 (a matter to be considered under the fourth sub-section) but they were not discontinued for the application of sub-section (3). The Judicial Committee was not required to consider the matter from the point of view, of succession, because sub-section (4) did not then exist. The Privy Council case has been approved of by this Court in *Figgies's Case*¹ to which I shall refer presently. From this, it follows that there was no discontinuance of the business at any time between 1921 and 1948 or even thereafter.

The next question to consider is whether there has been a succession or a mere change in the constitution of the assessee firm in the years 1939 and 1948. If we were to go by the original business excluding the newly started business of manufacture of umbrella and soap, I must say at once that there has been no succession and this case falls squarely within the rule of this Court in *Figgies's Case*¹. But even if one were to include the umbrella and soap business, I am of opinion that this case does not cease to be covered by *Figgies's case*¹. I shall examine both the aspects of the matter separately.

I shall pass on immediately to the facts of *Figgies's Case*¹. In that case, a partnership was formed in 1918 between Figgies, Mathews and Notley. In 1924, Mathews retired. In 1926, one Squire was taken as partner. In 1932, Figgies retired. In 1939, one Hillman was taken as a partner. In 1943, Notley retired. In 1945, one Gilbert was taken as a partner. By that time, all the original partners had ceased to be partners and new ones had come in their place. At every change, new deeds of partnership were executed and the shares were re-adjusted. No doubt, the later deeds did not say that the earlier deeds were revoked but a glance at those deeds (which I have seen in the original brief of the case) shows that they could not have existed side by side. In any case, there was no incorporation of the earlier documents by reference and they must be taken to have been superseded. In this case there is a definite statement that the earlier documents were 'revoked'. But whether the word 'revoked' is used or not, the resulting position is the same. Some partners went out and others came in till the identity of the original partners was completely lost. The question was whether, in these circumstances there was a succession within the meaning of sub-section (4) of section 25. This Court observed :

"The section does not regard a mere change in the personnel of the partners as amounting to succession and disregards such a change. It follows from the provisions of the section that a mere change in the constitution of the partnership does not necessarily bring into existence a new assessable unit or a distinct assessable entity and in such a case there is no devolution of the business as a whole."

This Court pointed out that though under the law of Partnership a firm has no legal existence apart from its partners and it is merely a name to describe its partners compendiously, it is equally true that under that law also there is ordinarily no dissolution of the firm by the mere incoming or outgoing of partners. This Court also pointed out that the position is a little different under the Income-tax Act where a firm is charged as an assessable entity distinct from its partners who can also be assessed individually. It was for this reason that sub-section (4) of section 25 expressly mentioned that a case of succession was not to be found where there was a mere change in the constitution of the firm. In other words, though a firm was to be regarded as an entity for the purpose of Income-tax Act, that entity was not to be taken to be disturbed by the coming in or out going of partners any more than that entity would be disturbed under the Law of Partnership.

Applying this test to the present case, it is quite clear that the identity of the entity was never lost and there was never a succession till the year 1948. It must

1. (1953) S.C.J. 635; A.I.R. 1953 S.C. 455; 24 I.T.R. 405; (1954) S.C.R. 171.

be remembered that this was initially a business of a family but not in the sense in which a Hindu Joint Family is said to have a business. From the very start, certain members of the family along with a stranger (Bagwanjee) carried on the business in piece goods etc. In 1918, and in 1934 different deeds were executed but the basic deed was that of 1918. By that time Bhagwanjee had retired and the business was in the hands of only the members of the family. Hemchand was then taken on in 1937 and in 1939, the original business was separated from the businesses newly started after 1922. Hemchand was given a share only in the newly started businesses to which section 25 could not possibly apply. When Hemchand retired, those businesses were also taken over and merged with the original business. In other words, the original business continued till 1943 in the hands of Narayanjee and Maneklal who were partners as far back as 1918 and three younger members of the family. In 1948, Maneklal and those three other members of the family sold this business to the company. It cannot be said these changes were not covered by the expression "changes in the constitution of the firm" and were comprehended in the term 'succession'. No question of the dissolution of the firm Sait Nagjee Purushotham & Co. ever arose. It continued right through; even the newly started businesses were owned by it and though for a time the newly started businesses and the other business were kept distinct so that the stranger Hemchand could not get the benefit of partnership in the Head Firm, it cannot be said that the old firm had either discontinued or had been succeeded to by another person. Hemchand was merely taken on as a working partner. His rights in the firm were extremely slender; he had to make a deposit of Rs. 15,000 with the Head Firm and he was to get a remuneration of Rs. 400 per mensem which was to go up or down according to the profits. In other words he was a mere employee though described as a working partner. As was pointed out by Chagla, C.J., in *Commissioner of Income-tax, Bombay v. Kolhia Hirdagarh Co., Ltd., Bombay*¹, and again in *Commissioner of Income-tax, Bombay City v. Sir Homi Mehta's Executors*², such documents must be interpreted not in legalistic way but on their true business aspect. Says the learned Chief Justice in the former case :

"It is open to us not merely to look at the documents, themselves, but also to consider the surrounding circumstances so as to arrive at a conclusion as to what was the real nature of the transaction from the point of view of two businessmen who were carrying out this transaction. In all taxation matters more emphasis must be placed, upon the business aspect of the transaction rather than on the purely legal and technical aspect ;....."

Judged from this stand point, the entry of Hemchand was not a dissolution of Sait Nagjee Purushotham & Co. He was brought in merely to do the business at one of the branches and to receive remuneration for doing the work. No doubt he was described as a working partner, but this term did not mean much. The very fact that he was not taken on in the original business also shows that the original business in respect of which alone the benefit of section 25 (3) and (4) can be claimed, continued uninterrupted. The changes in 1939 and 1943 therefore had no effect upon this claim.

Reliance was placed upon a decision of the Madras High Court in *S. N. A. S. A. Annamalai Chettiar v. Commissioner of Income-tax, Madras*³, as to the meaning of the word "discontinuance". In that case, a Hindu undivided family consisting of a father and son were carrying on money lending business under different vilasams. On March 28, 1939, there was a family partition and some vilasams were allotted to the father and the rest to the son, and he was the assessee. In the assessment year 1939-40, the son claimed that there was a discontinuance of the business within the meaning of section 25 (3) of the Income-tax Act, 1922 and claimed the benefit of that sub-section on the ground that the business of the joint family was taxed under the Act of 1918 and he was not liable to pay tax for the period between April 13, 1938 and March 28, 1939. It was held by Satyanarayana Rao and Raghava Rao, JJ.,

1. (1949) 17 I.T.R. 545 : A.I.R. 1950 Bom. 51 : 51 Bom.L.R. 699.

2. (1955) 28 I.T.R. 928 : I.L.R. 1956 Bom. 154 : 58 Bom.L.R. 112 : A.I.R. 1956 Bom.

415.

3. (1951) 2 M.L.J. 355 : I.L.R. (1952) Mad. 120 : 20 I.T.R. 238.

that as the joint family was split up, the business no longer continued in existence, but was terminated and there was a "discontinuance" within the meaning of section 25 (3) and the family was entitled to the benefit of that sub-section. Satyanarayana Rao, J., held that as the unit had disintegrated into its component parts so as to annihilate the unity of the business, each part which was thus divided was not identical with the whole, even though all the parts taken together constituted the whole and that, when the unifying principle of that whole no longer existed, the parts gained their individuality and became separate and distinct. The learned Judge held that there was discontinuance. Looked at from the point of view of Hindu Law, all these results may be said to follow. But, looked at from the point of view of section 25 (3), the business could be said to have ceased. The Income-tax Act thinks, not in terms of joint family business, but in terms of business in a business sense, and it is the business which was taxed under the Act of 1918 which must cease to exist before the benefit of section 25 (3) can be obtained. It is possible that the decision might be justified on the ground that the benefit was being claimed by one of the members of the erstwhile family and not by the whole family, though I express no opinion upon it, but even so that would be a case of succession rather than of discontinuance. The Madras case cannot however, be made applicable to the present facts, because, as pointed out already by me, there was no cessation of business in so far as the original business of piece goods, yarn and banking was concerned. That business continued in the hands of the same person who had paid tax under the Act of 1918 though there were changes in the constitution of the partnership in the years that passed.

I may refer here to a case decided by the Rangoon High Court in *Commissioner of Income-tax, Burma v. A. L. V. R. P. Firm*¹. In that case, a Hindu undivided family of Rangoon which consisted of two brothers carried on money-lending business under a single vilasam but with shops at several places including a shop at Rangoon. The shops at each of these places had separate capital and there were separate agents to manage the shops but there was a central system of accounts at one place showing the financial position of the family. In 1938-1939, the two brothers effected a partition and the Rangoon shop was thereafter conducted by the two brothers in partnership. On these facts, it was held by a Full Bench of the Rangoon High Court that there was no succession within the meaning of section 26 (2) of the Income-tax Act. It was pointed out that the family did not carry on separate businesses at each of the five places but had only a number of branches at these places of the same business and in order that there might be a succession, it was necessary that the person succeeding should have succeeded his predecessor in carrying on the business as a whole. The case was under section 26 (2) and slightly different considerations govern section 25 (4) which have induced the Legislature to keep the two sections separate. While it is possible that there may be a succession only to the business which had paid tax under the Act of 1918 for purposes of section 25 (4), as is the case here, a complete change of ownership of all the businesses is necessary for purposes of section 26 (2) before it can be said that there is succession. In both sections, change does not mean that every one who owned the former business should leave it and go away. The identity of the person who owned it before and the identity of the person who owned it later must, however, be distinct. In the present case this has not happened. All the facts have, perhaps, not come on the record with that clarity with which they should have but as pointed out by Chagla, C. J., in *Jesinghbai Ujamshi v. Commissioner of Income-tax, Bombay Maffusil*² there is nothing in law to preclude common partners constituting two entirely separate firms in respect of different businesses carried on by them for the purpose of the Indian Income-tax Act. Where they do this, it is mainly a question of fact whether there has been a succession to one of such partnerships or not whether for the purpose of section 26 (2) or for the purpose of section 25 (4). But it must be remembered that under section 25 (4), a mere change in the constitution of the partnership does not count and sec-

1. (1941) Rang. L.R. 45; A.I.R. 1940 Rang. 281 : 8 I.T.R. 531.

2. I.L.R. 1950 Bom. 691; A.I.R. 1950 Bom. 193 : 52 Bom.L.R. 94; 18 I.T.R. 23.

tions 25 (4) and 26 (2) do not apply at the same time. I am not prepared to say that in this case in respect of the original business there was anything more than a mere change in the constitution of the partnership. The business of umbrella and soap which never paid tax under the Act of 1918 could be dealt with by the partners as they liked without affecting the question of relief under section 25 in respect of the Head business.

In my judgment, these appeals must be allowed and the question answered in favour of the assessee firm but only in respect of the business in piece-goods, yarn and banking which alone had paid tax under the Income-tax Act of 1918. I would therefore, allow the appeals with costs here and in the High Court.

ORDER.

In accordance with the opinion of the majority the appeals are dismissed with costs.

V.B.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S. K. DAS, J. L. KAPUR AND M. HIDAYATULLAH, JJ.

Pramatha Nath Talukdar and another

.. *Appellants**

v.

Saroj Ranjan Sarkar

.. *Respondent.*

Criminal Procedure Code (V of 1898), sections 200, 202, 203 and 204—First complaint dismissed under section 203 of the Code—Second complaint on same facts—When competent—Absence of sanction under section 196-A of the Code—Effect.

Practice—Appellate Side Rules (High Court of Calcutta)—Division Bench of two Judges if can refer any matter to a larger Bench for decision in a criminal matter.

By Majority (Das, J., dissenting):—An order of dismissal under section 203 of the Criminal Procedure Code (V of 1898) is no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g., where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish, or where the new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced.

Following *Vadilal Panchal v. Dattatraya Dulaji Chadigaonker and another*, (1961) 2 S.C.J. 39 : (1961) M.L.J. (Cr.) 380 : (1961) 2 M.L.J. (S.C.) 16 : (1961) 2 An.W.R. (S.C.) 16 : (1961) 1 S.C.R. 1, 9, 10 and *Ramgopal Ganpatrai Ruria v. State of Bombay*, (1958) S.C.J. 266 : (1958) M.L.J. (Cr.) 217 : (1958) S.C.R. 618, 634, it was held that in the circumstances of the instant case, the bringing of the fresh complaint is a gross abuse of the process of the Court and is not with the object of furthering the interests of justice.

Per S. K. Das, J. (dissenting) :—The absence of a proviso to rule 9 in Chapter II of the Rules of the High Court at Calcutta (Appellate Side) corresponding to the proviso to rule 1, does not take away the inherent power of the Chief Justice to refer any matter to a Bench of three Judges. This is not a case where the Judges composing the Court are equally divided in opinion, but is a case where the Judges composing the Division Bench consider that the case is one of such importance that it should be heard by a larger Bench.

Having regard to the distinction between the offence of abetment by conspiracy and the offence of criminal conspiracy, though the second complaint used the expression "criminal conspiracy" it really disclosed an offence of abetment by conspiracy for which offence no consent or sanction under section 196-A of the Criminal Procedure Code (V of 1898) was necessary. Thus, there was no violation of the provisions of section 196-A of the Code.

In the circumstances of the instant case in all matters the Magistrate misdirected himself as to the true scope of the enquiry before him and he forgot that what he had to find was whether *prima facie* there was believable evidence in support of the allegations made in the complaint. Thus there are no grounds for interfering with the judgment and order of the Special Bench.

Appeals by Special Leave from the Judgment and Order dated the 22nd/23rd December, 1960, and from the Order dated the 17th March, 1961, of the Calcutta High Court in Criminal Revision Nos. 1049 and 681 of 1959.

C. K. Daphtary, Solicitor-General of India (*I. N. Shroff*, Advocate, with him), for Appellant (In Cr. A. No. 75 of 1961).

Purushottam Trikamdas, Senior Advocate (*Prasunchandra Ghosh*, *S. C. Mitter* and *I. N. Shroff*, Advocates, with him), for Appellant (In Cr. A. No. 77 of 1961).

M. C. Setalvad, Attorney-General for India (*Alak Gupta*, Advocate, and *S. N. Andley*, *Rameshwar Nath* and *P. L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, with him), for Respondent (In both the Appeals).

The Court delivered the following Judgments :

S. K. Das, J.—I regret that I have come to a conclusion different from that of my learned brethren in these appeals. I proceed now to state the necessary facts, the arguments advanced before us and my conclusions on the various questions urged.

By an order dated 10th April, 1961, this Court granted Special Leave asked for by the two appellants herein, *Pramatha Nath Talukdar* and *Saurindra Mohan Basu*, to appeal to this Court from two orders made by the High Court of Calcutta, one dated 22nd/23rd December, 1960 and the other dated 17th March, 1961. By the first order a Special Bench of the Calcutta High Court dismissed two applications in revision which the appellants had made to the said High Court against an order of the Chief Presidency Magistrate of Calcutta dated 11th April, 1959 by which the said Magistrate issued processes against the two appellants for offences alleged to have been committed by them under sections 467 and 471 read with section 109 of the Indian Penal Code on a complaint made by *Saroj Ranjan Sarkar*, respondent herein. By the second order a Division Bench of the said High Court refused the prayer of the appellants for a certificate under Article 134 (1) (c) of the Constitution of India that the case was a fit one for appeal to this Court. This refusal was based primarily on the ground that the order sought to be appealed from was not a final order within the meaning of the Article aforesaid.

In pursuance of the Special Leave granted by this Court four appeals were filed, two against the order dated 22nd/23rd December, 1960 and the other two against the order dated 17th March, 1961. The two appeals numbered 76 and 78 of 1961 from the order dated 17th March, 1961 were withdrawn on the ground that Special Leave having been granted against the order of the Special Bench dated 22nd/23rd December, 1960, the appellants did not wish to press the appeals from the later order dated 17th March, 1961. Therefore, the present judgment relates to the two appeals numbered 75 and 77 of 1961 which are from the judgment and order of the Special Bench dated 22nd/23rd December, 1960.

The principal question which arises for decision in these two appeals is whether a second complaint can be entertained by a Magistrate who or whose predecessor had, on the same or similar allegations, dismissed a previous complaint, and if so, in what circumstances should such a second complaint be entertained. The question is one of general importance and has given rise to some divergence of opinion in the High Courts.

Let me first state the facts which have led to the filing of the second complaint in the present case. *Saroj Ranjan Sarkar*, who is the youngest brother of the late *Nalini Ranjan Sarkar*—a well-known public man, financier and industrialist of Bengal—filed a petition of complaint in the Court of the Chief Presidency Magistrate, Calcutta, on 3rd April, 1959. I do not pause here to state the allegations made in that petition, as I shall have occasion to refer to them in detail later on. The complaint was filed against four persons—the appellants herein and two other persons, *Narendra Nath Law* and *Amiya Chakravarty*. A previous complaint

on more or less the same allegations was made by Promode Ranjan Sarkar, second brother of the late Nalini Rajan Sarkar. That complaint was made on 17th March, 1954 and was dismissed under section 203 of the Code of Criminal Procedure by the then Chief Presidency Magistrate, Shri N. C. Chakravarti, on 6th August, 1954. Thereafter, an application in revision was made by Promode Ranjan Sarkar to the High Court of Calcutta, which gave rise to Revision Case No. 1059 of 1954. This application in revision was dismissed on 8th July, 1955 by Debabrata Mookerjee, J. Promode Ranjan Sarkar then applied for a certificate under Article 134 (1) (c) of the Constitution, but such a certificate was refused by a Bench of the Calcutta High Court on 1st September, 1955. Promode Ranjan Sarkar applied for Special Leave from this Court and obtained such leave on 13th February, 1956. An appeal was filed in pursuance of that Special Leave, but ultimately Promode Ranjan Sarkar withdrew his appeal by filing a petition on 3rd February, 1959. In that petition he stated that at the intervention of common friends and well-wishers of the parties, he had settled his disputes with the respondents therein and did not want to proceed with the appeal. The appeal was accordingly withdrawn on 12th March, 1959. Then, within about 22 days of that order, Saroj Ranjan Sarkar filed the complaint which has given rise to the present proceedings. For convenience and brevity, I shall refer to Promode Ranjan Sarkar's complaint as the first complaint and Saroj Ranjan Sarkar's as the second complaint.

It is necessary here to give a little more of the background history of the second complaint. As stated earlier, the late Nalini Ranjan Sarkar was a well-known person in Bengal. He was the Governing or Managing Director of N. R. Sarkar & Co., Ltd. which managed several public limited companies, such as, Hindusthan Development Corporation, Ltd., Hindusthan Heavy Chemicals, Ltd., and Hindusthan Pilkington Glass Works, Ltd. He was also closely connected with the Hindusthan Co-operative Insurance Society, Ltd. of which he held a large number of shares. On 4th January, 1948 he obtained leave of absence from the Directors of N. R. Sarkar & Co., Ltd. for a period of one year with a view to joining the Ministry in West Bengal and he assumed office as Finance Minister of the West Bengal Government on 23rd January, 1948. Later, the leave granted to him for one year was extended. He owned 4,649 shares of N. R. Sarkar & Co., Ltd. Pramatha Nath Talukdar, who was a paid employee of the Hindusthan Co-operative Insurance Society, Ltd. up to the end of July, 1953 was also a Director of N. R. Sarkar & Co., Ltd. He held 299 shares of the said company. Promode Ranjan Sarkar held 50 shares. Santi Ranjan Sarkar, son of a deceased brother of Nalini Ranjan Sarkar, held one share. Thus, it would appear that Nalini Ranjan Sarkar was the owner of the largest number of shares of N. R. Sarkar & Co., Ltd. and for all practical purposes he controlled the affairs of that company. On 31st July, 1951, Nalini Ranjan Sarkar executed a deed of trust in respect of 3,649 shares out of the shares held by him in N. R. Sarkar & Co., Ltd. By the said trust-deed he appointed Promode Ranjan Sarkar, Pramatha Nath Talukdar and Narendra Nath Law as the trustees; but the beneficiaries under the trust-deed were his four brothers, namely, Promode Ranjan Sarkar, Pabitra Ranjan Sarkar, Prafulla Ranjan Sarkar and Saroj Ranjan Sarkar, as also Santi Ranjan Sarkar, the son of a deceased brother. It was alleged that the balance of 1,000 shares held by Nalini Ranjan Sarkar was kept in custody with Pramatha Nath Talukdar and according to the case of the complainant, these shares were kept in deposit with Pramatha Nath Talukdar for the benefit of the complainant and his brothers. Nalini Ranjan Sarkar died on 25th January, 1953. It was alleged that a few days after the funeral ceremony had been performed, Saurindra Mohan Basu casually informed Promode Ranjan Sarkar that his brother Nalini Ranjan Sarkar had executed two documents, to wit, an unregistered deed of agreement dated 19th January, 1948 by which Pramatha Nath Talukdar was appointed Managing Director of N. R. Sarkar & Co., Ltd. and a deed of transfer of 1,000 shares dated 5th February, 1951 in favour of Pramatha Nath Talukdar. Promode Ranjan Sarkar and his brothers did not give credence to the information conveyed, and wanted to see the documents. It was alleged that this request

was not complied with. On 31st July, 1953, *i.e.*, about six months after the death of Nalini Ranjan Sarkar, Pramatha Nath Talukdar resigned from his salaried post under the Hindusthan Co-operative Insurance Society, Ltd. and sought to assume control of N. R. Sarkar & Co., Ltd. as its Managing Director. This led to some trouble between Promode Ranjan Sarkar and the appellants and also to some correspondence between Promode Ranjan Sarkar on one side and N. R. Sarkar & Co., Ltd. on the other, details whereof are not necessary for our purpose. On 22nd September, 1953 a meeting of the Board of Directors of N. R. Sarkar & Co., Ltd. was held. It was alleged that the meeting was held irregularly without any agenda and a resolution was adopted, despite Promode Ranjan Sarkar's protest, by which the appointment of Pramatha Nath Talukdar as Managing Director of N. R. Sarkar & Co., Ltd. was renewed for seven years. In September, 1953 Promode Ranjan Sarkar formally wrote to N. R. Sarkar & Co., Ltd. for inspection of the alleged deeds of agreement and transfer. On 1st October, 1953 an inspection was taken, and on 13th October, 1953 Promode Ranjan Sarkar was allowed to take photographs of the relevant portions of the documents. On this occasion Promode Ranjan Sarkar also inspected the minutes of the proceedings of N. R. Sarkar & Co., Ltd. and it was alleged that the proceedings dated 16th January, 1948 purporting to bear the signature of Nalini Ranjan Sarkar were forged. The main allegations in the first and second complaints related to three documents and were to the effect

"that in order to assume complete control over N. R. Sarkar & Co., Ltd. and the concerns under its managing agency, the accused persons entered into a criminal conspiracy with one another and others unknown, to dishonestly and fraudulently forge a deed of agreement, and a deed of transfer and make a false document, to wit, minute book of N. R. Sarkar & Co., Ltd. and in pursuance thereof dishonestly and fraudulently forged and/or caused to be forged and used as genuine the said documents."

It will be noticed that three documents were stated to have been forged, and they were—

(1) An unregistered deed of agreement purporting to have been executed by the late Nalini Ranjan Sarkar as Governing Director of N. R. Sarkar & Co., Ltd. on 19th January, 1948 appointing Pramatha Nath Talukdar as the Managing Director of N. R. Sarkar & Co., Ltd., on a remuneration of Rs. 1,500—100—2,000 per month. This document bore the signature of Saurindra Mohan Basu as a witness attesting the signature of Nalini Ranjan Sarkar, which signature was stated to have been forged.

(2) A transfer deed in respect of 1,000 shares of N. R. Sarkar & Co., Ltd., which were said to have been entrusted to Pramatha Nath Talukdar, transferring them to the latter for an alleged consideration of rupees one lac purporting to have been executed by the late Nalini Ranjan Sarkar on 5th February, 1951 with Saurindra Mohan Basu as the attesting witness both for the transferor and the transferee.

(3) Minutes of the proceedings of the Board meeting of N. R. Sarkar & Co., Ltd. dated 16th January, 1948 purporting to bear the signature of the late Nalini Ranjan Sarkar and containing a resolution to the effect that the Governing Director approved of a draft agreement of appointment between the Company and Pramatha Nath Talukdar for appointing the latter as Managing Director of the Company and that the Board of Directors approved of the said draft agreement.

Of the aforesaid three documents the one relating to the alleged transfer of 1,000 shares, referred to as (2) above, is the subject of a separate suit stated to be now pending in the Calcutta High Court. That document is not, therefore, directly the subject-matter of the second complaint. As to the unregistered deed of agreement referred to as (1) above, it may be stated that the original document could not be later found, and on behalf of the appellants and other accused persons it was stated that the document was not in their possession or control. As stated earlier, Promode Ranjan Sarkar had obtained a photostatic copy of the relevant portions of the document. As to this document the main allegation of the com-

plainant was that it was engrossed on a rupee stamp-paper which had been issued, on renewal, in the name of P. D. Himmatsinghka & Co., a firm of solicitors in Calcutta, and evidence was led at the enquiry into the first complaint that the paper was stolen from that firm and furthermore that the signature on the document purporting to be that of Nalini Ranjan Sarkar was not his signature at all. With regard to the minutes of the proceedings dated 16th January, 1948 the allegation was that the minutes were typed on a sheet of paper bearing the letter-head N.R. Sarkar & Co., Ltd. with telephone number "City 6091" printed thereon; but the City Exchange did not come into existence until December, 1948 and the telephone connection relating to number "City 6091" was obtained for the first time by the Hindusthan Co-operative Insurance Society, Ltd. on or about 18th March, 1949; and therefore the paper with the letter-head N. R. Sarkar & Co., Ltd. with telephone number "City 6091" printed thereon could not have been in existence on the alleged date of the proceeding of the Board of Directors, namely 16th January, 1948. In the second complaint certain other circumstances were also alleged in support of the allegation that the unregistered deed of agreement dated 19th January, 1948 and the minutes of the proceedings dated 16th January, 1948 were forged. It is, however, unnecessary to refer to those circumstances in detail here.

The learned Chief Presidency Magistrate, Shri Bijayesh Mukherjee, who dealt with the second complaint considered all the relevant materials and came to the following conclusions :

(1) There was no delay in making the second complaint, if one had regard to the circumstances which led to the first complaint and the withdrawal of the appeal in the Supreme Court on 12th March, 1959 arising out of the order made on the first complaint ;

(2) the dismissal of the first complaint and the application in revision arising therefrom by Debabrata Mookerjee, J. did not, as a matter of law, operate as a bar to the entertainment of the second complaint ;

(3) the second complaint was not an attempt at blackmail; and

(4) the relevant materials in the record showed *prima facie* that the minutes of the proceedings dated 16th January, 1948 were forged and so also the unregistered deed of agreement dated 19th January, 1948.

The learned Chief Presidency Magistrate then said :

"*Prima facie*, I am satisfied about the truth of the allegations the complaint makes. That apart the complaint is for an offence triable by a Court of Sessions. And the materials I see before me are such as in my opinion may lead a reasonable body of men to believe the truth thereof. Judged so, there is in my opinion sufficient ground for proceeding within the meaning of section 204 of the Procedure Code."

On the question as to which of the four accused persons against whom process should issue, the learned Chief Presidency Magistrate, came to the conclusion that there was a *prima facie* case against two of the accused persons only, namely, Pramatha Nath Talukdar and Saurindra Mohan Basu. Saurindra Mohan Basu, it may be stated here, was a solicitor of N. R. Sarkar & Co., Ltd. and had attested the signature of Nalini Ranjan Sarkar on the unregistered deed of agreement. The learned Chief Presidency Magistrate held that there was no sufficient ground for proceeding against the other two accused persons, namely, Narendra Nath Law and Amiya Chakravarty.

Against the aforesaid order of the Chief Presidency Magistrate two applications in revision were filed by the appellants herein. These applications in revision were first heard by a Division Bench of two Judges of the Calcutta High Court, P. B. Mukherjee and H. K. Bose, JJ. In view of the importance of the questions raised in the two applications in revision and some earlier decisions of the Calcutta

High Court bearing on those questions to which I shall presently refer, P. B. Mukherjee, J. came to the conclusion that the applications should be referred to a larger Bench to be constituted by the Chief Justice under the rules of the Court. H. K. Bose, J. (as he then was) was inclined to take the view that the applications in revision must fail, but in deference to the views expressed by P. B. Mukherjee, J. agreed that the applications should be referred to the Chief Justice for constituting a larger Bench. The matter was then referred to the learned Chief Justice, who constituted a Special Bench of three Judges to hear the two applications in revision. This Special Bench heard the two applications in revision and dismissed them by its order dated 22nd/23rd December, 1960.

Three questions were agitated before the Special Bench. The first was whether the Special Bench was lawfully in seisin of the case and was competent to deal with the applications in revision. The second was whether the learned Chief Presidency Magistrate had jurisdiction to take cognizance of the offences alleged, in the absence of a sanction under section 196-A of the Code of Criminal Procedure. The third and the principal question was whether it was open to the learned Chief Presidency Magistrate to entertain a second complaint on the same allegations when his predecessor had dismissed the first complaint; and if it was open to him to entertain the second complaint, should he have entertained it in the circumstances of the present case? The Special Bench unanimously decided these three questions against the appellants and further came to the conclusion that there was no undue delay in making the second complaint; neither was it frivolous nor made in bad faith. It further expressed the view that it saw no reasons to differ from the finding of the learned Chief Presidency Magistrate that there was a *prima facie* case against the two appellants.

Now, as to the first question. Chapter II of the Rules of the High Court at Calcutta (Appellate Side) deals with the constitution and powers of the Benches of the Court. Rule 1 of the said chapter says in effect that a Division Bench for the hearing of appeals from decrees or orders of the subordinate Civil Courts shall consist of two or more Judges as the Chief Justice may think fit; there is a proviso [Proviso (ii)] to the rule which says that on the requisition of any Division Bench, or whenever he thinks fit, the Chief Justice may appoint a Special Division Bench to consist of three or more Judges for the hearing of any particular appeal, or any particular question of law arising in an appeal, or of any other matter. It is clear that the rule and the proviso deal with the hearing of appeals from decrees or orders of the subordinate Civil Courts; in other words, they deal with civil matters. Rule 9 of the same chapter deals with criminal matters and sub-rule (1) of the said rule says that a Division Bench for the hearing of cases on appeal, reference, or revision in respect of the sentence or order of any Criminal Court shall consist of two or more Judges. There is no proviso to this rule similar to the proviso to rule 1, referred to earlier, and the argument is that in the absence of such a proviso it was not open to the Division Bench consisting of Mukherjee and Bose, JJ. to refer the case back to the Chief Justice for the constitution of a larger Bench (though it was open to the Chief Justice to constitute originally a Division Bench of three Judges to hear the case), and if the Judges were equally divided in opinion, section 429 of the Code of Criminal Procedure would apply and the case had to be laid before another Judge and judgment given according to the opinion of the third Judge. I am unable to accept this argument as correct. It is clear from the rules in Chapter II that the constitution of Benches is a matter for the Chief Justice and rule 13 in Chapter II says that a Full Bench appointed for any of the purposes mentioned in Chapter VII, rules 1 to 5, shall consist of five Judges or three Judges as the Chief Justice may appoint. Now, rule 1 in Chapter VII says *inter alia* that whenever one Division Bench shall differ from any other Division Bench upon a point of law or usage having the force of law, the case shall be referred for decision by a Full Bench and rule 5 says that if any such question arises in any case coming before a Division Bench as Court of Criminal Appeal, Reference or Revision, the Court referring the case shall state

the point or points on which they differ from the decision of a former Division Bench, and shall refer the case to a Full Bench for such orders as to such Bench seem fit. In his judgment P. B. Mukherjee, J. referred to two earlier decisions of the Calcutta High Court, *Nilratan Sen v. Jogesh Chandra Bhattacharjee*¹, and *Kamal Chandra Pal v. Gourchand Adhikary*², and observed that the question as to whether those decisions were good law arose in the case and he gave that as a reason for referring the case to the Chief Justice for the constitution of a larger Bench. Even if rules 1 and 5 in Chapter VII may not, strictly speaking, apply to the present case because the Division Bench consisting of Mukherjee and Bose, JJ. did not formulate the point or points on which they differed from the earlier Division Bench decisions referred to by Mukherjee, J., I think that the principle of those rules would apply and it was open to the Chief Justice, on a reference by the Division Bench to constitute a larger Bench to consider the case. I am also in agreement with the view expressed by the Special Bench that the absence of a proviso to rule 9 in Chapter II corresponding to the proviso to rule 1 does not take away the inherent power of the Chief Justice to refer any matter to a Bench of three Judges. Sub-rule (1) of rule 9 itself provided that a Division Bench for the hearing of cases on appeal, reference, or revision in respect of the sentence or order of any Criminal Court shall consist of two or more Judges. Therefore, it was open to the Chief Justice to constitute a Bench of three Judges for the hearing of the case and in my view it made no difference whether he constituted such a Bench originally or on a reference back by the Division Bench. I further think that the Chief Justice must have the inherent power to constitute a larger Bench in special circumstances. Take, for instance, a case where one Judge of the Division Bench feels, for a sufficient and good reason, that he should not hear the case. It is obvious that in such a case the matter must be referred back to the Chief Justice for the constitution of another Bench. The Chief Justice, I think, must possess such an inherent power in the matter of constitution of Benches and in the exercise thereof he can surely constitute a larger Bench in a case of importance where the Division Bench hearing it considers that a question of the correctness or otherwise of earlier Division Bench decisions of the same Court will fall for consideration in the case. Section 429 of the Code of Criminal Procedure does not apply to such a case because it is not a case where the Judges composing the Court are equally divided in opinion. Rather it is a case where the Judges composing the Division Bench consider that the case is one of such importance that it should be heard by a larger Bench.

My conclusion, therefore, is that there was nothing illegal in the Division Bench consisting of Mukherjee and Bose, JJ. referring the case back to the Chief Justice; nor was there anything illegal in the Chief Justice constituting a Special Bench of three Judges to hear the applications in revision. The Special Bench constituted by the Chief Justice was lawfully in seisin of the case and was competent to deal with it. The objection as to the jurisdiction of the Special Bench to hear the case was, in my opinion, rightly overruled by it.

Now, as to sanction. Section 196-A of the Code of criminal Procedure may be read first. That section is in these terms :

"196-A. No Court shall take cognizance of the offence of criminal conspiracy punishable under section 120-B of the Indian Penal Code,

(1) in a case where the object of the conspiracy is to commit either an illegal act other than an offence, or a legal act by illegal means, or an offence to which the provisions of section 196 apply, unless upon complaint made by order or under authority from the 'State Government' or some officer empowered by the 'State Government' in this behalf, or

(2) in a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the 'State Government', or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the 'State Government', has by order in writing, consented to the initiation of the proceedings :

Provided that where the criminal conspiracy in one to which the provisions of sub-section (4) of section 195 apply no such consent shall be necessary."

1. (1095) I.L.R. 23 Cal. 983.

2. (1897) I.L.R. 24 Cal. 286.

The argument before us on behalf of the appellants has proceeded on the footing that in Para. 5 of the second complaint Saroj Ranjan Sarkar had alleged that the accused persons had entered into a criminal conspiracy with one another and other persons unknown, to dishonestly and fraudulently forge certain documents and in pursuance thereof either forged or caused to be forged those documents and used them as genuine. This allegation, it is argued, attracted clause (2) of section 196-A inasmuch as the object of the conspiracy was to commit non-cognizable offences under sections 467 and 471 of the Indian Penal Code; therefore, it was necessary to obtain, by order in writing, the consent of the State Government or of the Chief Presidency Magistrate to the initiation of the proceedings and such consent not having been obtained, the issue of processes by the Chief Presidency Magistrate violated the provisions of section 196-A of the Code of Criminal Procedure. The Special Bench repelled this argument on the following grounds. It pointed out the distinction between the offence of criminal conspiracy as defined in section 120-A and punishable by section 120-B and the offence of abetment by conspiracy as defined in the clause, *secondly*, in section 107 of the Indian Penal Code. It then pointed out that the Chief Presidency Magistrate did not take cognizance of the offence of criminal conspiracy to commit forgery which would be punishable under section 120-B read with section 467 of the Indian Penal Code, but he took cognizance of the offence of abetment of forgery punishable under section 467 read with section 109 of the Indian Penal Code and for this offence no sanction under section 196-A of the Code of Criminal Procedure was necessary. The Special Bench further expressed the view that the primary offences which the second complaint disclosed were the offences of forgery, of using forged documents as genuine, and of abetment of the said offences and as cognizance of these offences did not require sanction or prior consent of the authorities mentioned in section 196-A; the order of the Chief Presidency Magistrate could not be said to have violated the provisions of that section.

The correctness of these views of the Special Bench has been very seriously contested. I may make it clear at the very outset that the mandatory provisions of section 196-A of the Code of Criminal Procedure cannot be evaded by resorting to a mere device or camouflage. The test whether sanction is or is not necessary does not depend on mere astuteness of drafting the petition of complaint. For example, in the second petition of complaint under consideration before us the heading indicated that the offences in respect of which the petition of complaint was filed were offences under sections 467, 471 and 109 of the Indian Penal Code; but in Para. 5 of the petition the allegation was that the accused persons had entered into a criminal conspiracy with one another and others unknown, to forge certain documents. It would not be proper to decide the question of sanction merely by taking into consideration the offences mentioned in the heading or the use of the expression "criminal conspiracy" in Para. 5. The proper test should be whether the allegations made in the petition of complaint disclosed primarily and essentially an offence or offences for which a consent in writing would be necessary to the initiation of the proceedings within the meaning of section 196-A (2) of the Code of Criminal Procedure. It is from that point of view that the petition of complaint must be examined. There is another principle laid down by this Court which should be kept in mind. The allegations made in the complaint may have more than one aspect; and may disclose more than one offence. What would be the position when some of the offences disclosed do not require any sanction while others require sanction? This question was considered by this Court in *Basir-ul-hug and others v. State of West Bengal*¹. That was a case in which the accused person lodged information at a Police Station that X had beaten and throttled his mother to death and when the funeral pyre was in flames, he entered the cremation ground with police; the dead body was examined and the complaint was found to be false. On the complaint of X the accused person was charged with offences under section

1. (1953) S.C.J. 405 : (1953) 1 M.L.J. 775 : (1953) S.C.R. 836.

297, Indian Penal Code (trespass to wound religious feelings) and section 500, Indian Penal Code (defamation). It was contended that as the complaint disclosed offences under sections 182 and 211, Indian Penal Code, the Court could not take cognizance of the case except on a complaint by the proper authority under section 195 of the Code of Criminal Procedure. It was held that the facts which constituted the offence under section 297 were distinct from those which constituted an offence under section 182, as the act of trespass was alleged to have been committed after the making of the false report, so section 195 was no bar to the trial of the charge under section 297. It was further held that as regards the charge under section 500 where the allegations made in a false report disclose two distinct offences, one against a public servant and the other against a private individual, the latter is not debarred by the provisions of section 195 of the Code of Criminal Procedure from seeking redress for the offence committed against him. Referring to section 195 of the Code of Criminal Procedure Mahajan, J., who delivered the judgment of the Court said :

"The statute thus requires that without a complaint in writing of the public servant concerned no prosecution for an offence under section 182 can be taken cognizance of. It does not further provide that if in the course of the commission of that offence other distinct offences are committed, the magistrate is debarred from taking cognizance in respect of those offences as well. The allegations made in a complaint may have a double aspect, that is, on the one hand these may constitute an offence against the authority of the public servant or public justice, and on the other hand, they may also constitute the offence of defamation or some other distinct offence. The section does not *per se* bar the cognizance by the magistrate of that offence, even if no action is taken by the public servant to whom the false report has been made.....

As regards the charge under section 500, Indian Penal Code, it seems fairly clear both on principle and authority that where the allegations made in a false report disclose two distinct offences, one against the public servant and the other against a private individual, that other is not debarred by the provisions of section 195 from seeking redress for the offence committed against him."

Keeping the aforesaid two principles in mind let me examine the second complaint in this case in order to find out what essential offences the allegations made therein disclosed. Paragraph 5 of the petition of complaint on which much reliance has been placed on behalf of the appellants alleges (1) that the accused persons entered into a criminal conspiracy with one another and others unknown, to forge certain documents ; (2) that in pursuance of the conspiracy those documents were forged or caused to be forged ; and (3) that the documents so forged were used as genuine. The paragraph then recited in detail the three documents which were said to have been forged. It is thus clear that apart from the conspiracy, the second complaint alleged that offences under sections 467 and 471 of the Indian Penal Code had also been committed. The Special Bench rightly pointed out that the offences under sections 467 and 471 of the Indian Penal Code were distinct from the offence of criminal conspiracy and did not require any prior consent for the initiation of proceedings therefor under section 196-A (2) of the Code of Criminal Procedure. The question, therefore, boils down to this : in view of the allegation that there was a criminal conspiracy, was the Chief Presidency Magistrate debarred from taking cognizance of the case even though certain other distinct offences were alleged which did not require sanction? I am in agreement with the Special Bench that the answer to the question must be in the negative. Furthermore, it appears to me that though the expression "criminal conspiracy" occurs in Para. 5 of the complaint, the facts alleged in the petition of complaint essentially disclose an offence of abetment by conspiracy. This brings us to the distinction between the offence of criminal conspiracy as defined in section 120-A and the offence of abetment by conspiracy as defined in section 107 of the Indian Penal Code. Section 120-A which defines the offence of criminal conspiracy and section 120-B which punishes the offence are in Chapter V-A of the Indian Penal Code. This Chapter introduced into the criminal law of India a new offence, namely, the offence of criminal conspiracy. It was introduced by the Criminal Law Amendment Act, 1913 (VIII of 1913). Before that, the sections of the Indian Penal Code which directly dealt with the subject of conspiracy were those contained in Chapter V and section 121-A

(Chapter VI) of the Code. The present case is not concerned with the kind of conspiracy referred to in section 121-A. The point before us is the distinction between the offence of abetment as defined in section 107 (Chapter V) and the offence of criminal conspiracy as defined in section 120-A (Chapter V-A). Under section 107, second clause, a person abets the doing of a thing, who engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing. Therefore, in order to constitute the offence of abetment by conspiracy, there must first be a combining together of two or more persons in the conspiracy; secondly, an act or illegal omission must take place in pursuance of that conspiracy and in order to the doing of that thing. It is not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. It is worthy of note that a mere conspiracy or a combination of persons for the doing of a thing does not amount to an abetment. Something more is necessary, namely, an act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing for which the conspiracy was made. Before the introduction of Chapter V-A conspiracy, except in cases provided by sections 121-A, 311, 400, 401 and 402 of the Indian Penal Code, was a mere species of abetment where an act or an illegal omission took place in pursuance of that conspiracy, and amounted to a distinct offence. Chapter V-A, however, introduced a new offence defined by section 120-A. That offence is called the offence of criminal conspiracy and consists in a mere agreement by two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means; there is a proviso to the section which says that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. The position, therefore, comes to this. The gist of the offence of criminal conspiracy is in the agreement to do an illegal act or an act which is not illegal by illegal means. When the agreement is to commit an offence, the agreement itself becomes the offence of criminal conspiracy. Where, however, the agreement is to do an illegal act which is not an offence or an act which is not illegal by illegal means, some act besides the agreement is necessary. Therefore, the distinction between the offence of abetment by conspiracy and the offence of criminal conspiracy, so far as the agreement to commit an offence is concerned, lies in this. For abetment by conspiracy mere agreement is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for. But in the offence of criminal conspiracy the very agreement or plot is an act in itself and is the gist of the offence. Willes, J., observed in *Mulcahy v. The Queen*¹:

"When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means."

Put very briefly, the distinction between the offence of abetment under the second clause of section 107 and that of criminal conspiracy under section 120-A is this. In the former offence a mere combination of persons or agreement between them is not enough. An act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of the thing conspired for; in the latter offence the mere agreement is enough, if the agreement is to commit an offence.

So far as abetment by conspiracy is concerned the abettor will be liable to punishment under varying circumstances detailed in sections 108 to 117. It is unnecessary to detail those circumstances for the present case. For the offence of criminal conspiracy it is punishable under section 120-B.

Having regard to the distinction pointed out above, I am of the opinion that Para. 5 of the second complaint, though it used the expression "criminal cons-

piracy" really disclosed an offence of abetment by conspiracy. It made no allegation of any agreement between the several persons at a particular place or time. It said that the accused persons complained against entered into a conspiracy to forge certain documents and in pursuance of that conspiracy the documents were forged or caused to be forged. In other words, an illegal act was done in pursuance of the conspiracy and furthermore the documents so forged were used as genuine. Having regard to these allegations in Para. 5 of the second complaint, I am unable to hold that the learned Chief Presidency Magistrate was wrong in taking cognizance of the offence of abetment by conspiracy, for which offence no consent or sanction under section 196-A of the Code of Criminal Procedure was necessary. Therefore, there was no violation of the provisions of that section.

In this view of the matter it is unnecessary to consider the correctness or otherwise of the further view expressed in some of the decisions (*see, for example, State of Bihar v. Srilal Kejriwal*¹, to which the Special Bench has referred) that where the matter has gone beyond a mere conspiracy and substantive offences are alleged to have been actually committed in pursuance thereof, sections 120-A and 120-B are wholly irrelevant. That view has not been accepted as correct by some of the other High Courts. In the *State of Andhra Pradesh v. Kandimalla Subbaiah and another*² this Court held that offences created by sections 109 and 120-B, Indian Penal Code, were distinct offences, though for a reason stated somewhat differently from what I have stated. It further held that where a number of offences were committed by several persons in pursuance of a conspiracy, it was not illegal to charge them with those offences as well as with the offence of conspiracy to commit those offences, though it was not desirable to charge the accused persons with conspiracy with the ulterior object of letting in evidence which would otherwise be inadmissible and further more, it was undesirable to complicate a trial by introducing a large number of charges spread over a long period. The question was treated as one of propriety rather than of legality. The question of sanction was also considered in that case, but in view of the order of remand passed, no opinion was expressed thereon.

The Special Bench expressed the view that it was not necessary to go to the extent of saying that in a case of this nature sections 120-A and 120-B became wholly irrelevant. The Special Bench proceeded on the footing that irrespective of whether sections 120-A and 120-B became wholly irrelevant or not, the second complaint undoubtedly disclosed an offence of abetment by conspiracy and it was open to the Chief Presidency Magistrate to take cognizance of that offence. I think that there are no good reasons for holding that the view taken by the Special Bench is not correct. In my opinion, the Special Bench rightly overruled the objection as to the alleged violation of the provisions of section 196-A of the Code of Criminal Procedure.

Now, I come to the third and principal question agitated in these appeals. On behalf of one of the appellants, Saurindra Mohan Basu, Mr. Purshottam Trikumdas has argued before us that when the first complaint containing more or less the same allegations was dismissed under section 203 of the Code of Criminal Procedure by the Chief Presidency Magistrate, it was not at all open to his successor to entertain the second complaint. He has put the matter as one of law and has argued that the only way of getting rid of an order of dismissal under section 203 of the Code of Criminal Procedure known to the Code of Criminal Procedure is to have it set aside in accordance with the procedure laid down in sections 436 and 439 of the Code. He has further argued that, as a matter of law, a second complaint is not entertainable as long as the order of dismissal under section 203 of the Code of Criminal Procedure is not set aside by a competent authority. His argument is that the two decisions in *Niratan Sen v. Jogesh Chandra Bhattacharjee*³ and *Kamal Chandra Pal v. Gourchand Adhikary*⁴ should be held as good law. Section

1. A.I.R. 1960 Patna 459.

2. (1951) M.L.J. (Crl.) 726 : (1951) 2 S.C.J. 685 : (1951) 2 M.L.J. (S.C.) 198 : (1951)

3. An.W.R. (S.C.) 193 : A.I.R. 1951 S.C. 1241.

4. (1895) I.L.R. 23 Cal. 933.

5. (1897) I.L.R. 24 Cal. 286.

403 of the Code of Criminal Procedure is relevant to this argument. It embodies the well-established rule of common law that a man may not be put twice in peril for the same offence and that no man should be vexed with several trials for offences arising out of identical acts. An *Explanation* appended to the section says *inter alia* that the dismissal of a complaint or the discharge of an accused person is not an acquittal for the purposes of the section. If the Legislature had intended that the dismissal of a complaint or the discharge of an accused person would be a bar to fresh proceedings on the same allegations unless the order of dismissal or discharge were set aside by a higher Court, it would have said so either explicitly or by omitting the *Explanation* altogether. Therefore, the effect of the *Explanation* is that under section 403 a fresh trial is barred only in cases of acquittal or conviction by a Court of competent jurisdiction, coming within the purview of sub-section (1) thereof. This aspect of the question was considered in *Queen Empress v. Dolegbind Dass*¹, which was a case dealing with a previous order of discharge of the accused person. In that case, Maclean, C.J., referred to the decision in *Niratan Sen's case*² and said :

"There is no express provision in the Code to the effect that the dismissal of a complaint shall be a bar to a fresh complaint being entertained so long as the order of dismissal remains unreversed" [see *per Banerjee, J.*, in *Niratan Sen v. Jogesh Chandra Bhattacharjee*³]. I agree in that. If, then there be no express provision in the Code, what is there to warrant us in implying or in effect introducing into the Code a provision of such serious import ? In the absence of any other provision in the Code to justify such an implication I can appreciate no sound ground for the Court so acting ; were it to do so it would go perilously near to legislating, instead of confining itself to construing the Acts of the Legislature."

The question was then considered by a Full Bench of the Calcutta High Court in *Dwarka Nath Mondul v. Beni Madhab Banerjee*⁴, and it was held by the Full Bench (Ghose, J., dissenting) that a Presidency Magistrate was competent to rehear a warrant case triable under Chapter XXI of the Code of Criminal Procedure in which he had earlier discharged the accused person. *Niratan Sen's case*² and *Kamal Chandra Pal's case*⁵, were referred to in the arguments as summarised in the report but the view expressed therein was not accepted. Dealing with the question *Prinsep, J.*, said :

"There is no bar to further proceedings under the law and, therefore, a Magistrate to whom a complaint has been made under such circumstances, is bound to proceed in the manner set out in section 200, that is, to examine the complainant, and, unless he has reason to distrust the truth of the complaint, or for some other reason expressly recognised by law, such as, if he finds that no offence had been committed, he is bound to take cognizance of the offence on a complaint, and, unless he has good reason to doubt the truth of the complaint, he is bound to do justice to the complainant, to summon his witnesses and to hear them in the presence of the accused."

The same view was expressed by the Madras High Court in *In re Koyassan Kutty*⁶, and it was observed that there was nothing in law against the entertainment of a second complaint on the same facts on which a person had already been discharged, inasmuch as a discharge was not equivalent to an acquittal. This view was reiterated in *Kumariah v. Chinna Naicker*⁷, where it was held that the fact that a previous complaint had been dismissed under section 203 of the Code of Criminal Procedure was no bar to the entertainment of a second complaint. In *Hansabai Sayaji v. Anand Ganuji*⁸, the question was examined with reference to a large number of earlier decisions of several High Courts on the subject and it was held that there was nothing in law against the entertainment of a second complaint on the same facts. The same view was also expressed in *Ram Narain v. Panachand Jain*⁹, *Ramanand v. Srin*¹⁰ and *Allah Ditta v. Karam Baksh*¹⁰. In all these decisions it was recognised further that though there was nothing in law to bar the entertainment of a second complaint on the same facts, exceptional circumstances must exist for entertainment of a second complaint when on the same allegations a previous complaint had been dismissed. The question of the existence of exceptional circumstances for the entertainment of a

1. (1900) I.L.R. 28 Cal. 211.

2. (1896) I.L.R. 23 Cal. 983.

3. (1901) I.L.R. 28 Cal. 652 (F.B.).

4. (1897) I.L.R. 24 Cal. 286.

5. A.I.R. 1918 Mad. 494.

6. (1945) 2 M.L.J. 577 : A.I.R. 1946

Mad. 167.

7. A.I.R. 1949 Bom. 384.

8. A.I.R. 1949 Pat. 256.

9. I.L.R. 56 All. 425.

10. I.L.R. 12 Lah. 9.

second complaint is a question to which I shall come later. At the present moment, I am considering the argument of Mr. Purshottam Tricumdas that the law prohibits altogether the entertainment of a second complaint when a previous complaint on the same allegations had been dismissed under section 203 of the Code of Criminal Procedure. On this question the High Courts appear to me to be almost unanimously against the contention of Mr. Purshottam Tricumdas, and for the reasons given in the decisions to which I have earlier referred, I am unable to accept his contention. I accept the view expressed by the High Courts that there is nothing in law which prohibits the entertainment of a second complaint on the same allegations when a previous complaint had been dismissed under section 203 of the Code of Criminal Procedure. I also accept the view that as a rule of necessary caution and of proper exercise of the discretion given to a Magistrate under section 204 (1) of the Code of Criminal Procedure exceptional circumstances must exist for the entertainment of a second complaint on the same allegations; in other words, there must be good reasons why the Magistrate thinks that there is "sufficient ground for proceeding" with the second complaint, when a previous complaint on the same allegations was dismissed under section 203 of the Code of Criminal Procedure.

The question now is, what should be those exceptional circumstances? In *Queen Empress v. Dolegobind Das*¹ Maclean, C.J., said:

"I only desire to add that no Presidency Magistrate ought, in my opinion, to rehear a case previously dealt with by a Magistrate of co-ordinate jurisdiction upon the same evidence only, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice."

Thus, according to this decision, the exceptional circumstance must be such as would lead the Magistrate to think that the previous order of dismissal was due to a manifest error or resulted in a manifest miscarriage of justice. In *In re Koyassan Kutty*², Sadasiva Aiyar, J., formulated the test of exceptional circumstances in the following words:

"Taking it then that the discharge was proper and legal, there is no doubt nothing in law against the entertainment of a second complaint on the same facts as a discharge is not equivalent to an acquittal; but I think that unless very strong grounds are shown a person who has been charged once and discharged ought not to be harassed again on the same charge. It is not alleged that new facts have been discovered which the police did not know when they brought the first charge."

In this decision the test formulated was the discovery of new facts which were not known when the first charge of complaint was made. In *Kumariah v. Chinna Naick*³ the same test was again applied when it was observed:

"There is nothing to indicate that there was no proper investigation on the previous complaint or that there was any necessity for investigating the second complaint.....No additional witness had been cited in the second complaint, nor, as pointed out by the Additional Magistrate, was it alleged that any other kind of evidence had been discovered or was likely to be forthcoming."

It is worthy of note, however, that Kuppaswami Aiyar, J., did not say that the discovery of a new fact or new evidence must be of such a character that it was not known to the complainant when the prior complaint was brought and dismissed. In *Hansabai Sayaji v. Ananda Ganuji*⁴, it was pointed out that the circumstance that the second complaint was filed by a person other than the one who made the first complaint made no difference and the test laid down in some early Rangoon High Court decisions (*Ma The Kin v. Nga E Tha*⁵ and *U Shwe v. Ma Sein Bwin*⁶), was accepted as the correct test. In *Ma The Kin's case*⁵ the test was thus expressed:

"It is the duty of a Magistrate, therefore, who receives a complaint in a case where there has been a previous order of dismissal or discharge, not to issue process, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice, or unless new facts are adduced which the complainant had not knowledge of or could not with reasonable diligence have brought forward in the previous proceedings."

It will be noticed that in the test thus laid down the exceptional circumstances are brought under three categories: (1) manifest error, (2) manifest miscarriage

1. (1900) I.L.R. 28 Cal. 211.

2. A.I.R. 1918 Mad. 494.

3. (1945) 2 M.L.J. 577 : A.I.R. 1946 Mad.

4. A.I.R. 1919 Bom. 384.

5. 1 U.B.R. 19.

6. A.I.R. 1925 Rang. 114.

of justice, and (3) new facts which the complainant had no knowledge of or could not with reasonable diligence have brought forward in the previous proceedings. Any exceptional circumstances coming within any one or more of the aforesaid three categories would fulfil the test. In *Ram Narain v. Parachand Jain*¹, it was observed that an exhaustive list of the exceptional circumstances could not be given though some of the categories were mentioned. One new category mentioned was where the previous order of dismissal was passed on an incomplete record or a misunderstanding of the nature of the complaint. This new category would perhaps fall within the category of manifest error or miscarriage of justice.

It appears to me that the test laid down in the earliest of the aforesaid decisions, *Queen Empress v. Dolegobind Dass*², is really wide enough to cover the other categories mentioned in the later decisions. Whenever a Magistrate is satisfied that the previous order of dismissal was due to a manifest error or has resulted in a miscarriage of justice, he can entertain a second complaint on the same allegations even though an earlier complaint was dismissed under section 203 of the Code of Criminal Procedure. I do not think that in a matter of this kind it is either possible or even desirable that the exceptional circumstances must be stated with any more particularity or precision. The learned Advocate for the respondent argued before us that a new category should be added and he called it "frustration of justice." I am of the view that apart from any question of felicity of this new expression, this new category does not give any more assistance towards explaining the exceptional circumstances which must exist before a second complaint on the same allegations can be entertained. I am content in this case to proceed on the footing that the Magistrate must be satisfied that there was a manifest error or a miscarriage of justice before he can entertain a second complaint on the same facts.

In this case, two exceptional circumstances were adverted to before us. One is that the learned Chief Presidency Magistrate who dealt with the first complaint completely misdirected himself as to the true scope and effect of sections 203 and 204 of the Code of Criminal Procedure and this, it is contended, resulted in a manifest miscarriage of justice when he dismissed the first complaint under section 203 of the Code of Criminal Procedure. I am of the view that there is substance in this contention. Section 203 of the Code of Criminal Procedure states that the Magistrate may dismiss the complaint, if, after considering the statement on oath, if any, of the complainant and the witnesses and the result of the investigation or enquiry, if any, under section 202, there is in his judgement no sufficient ground for proceeding. Section 204 lays down that if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding, he shall issue a summons or a warrant, as the case may require. What is the true scope and effect of the expression "sufficient ground for proceeding" occurring in the aforesaid two sections? This was considered by this Court in *Vadilal Panchal v. Dattatraya Dulaji Ghadigaonker & another*³. With reference to sections 200, 202 and 203 of the Code of Criminal Procedure it was there observed:

"The inquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage; for the person complained against can be legally called upon to answer the accusation made against him only when a process has issued and he is put on trial."

It was further observed that if the Magistrate had not misdirected himself as to the scope of an enquiry under sections 202 and had applied his mind judicially to the materials before him, it would be erroneous in law to hold that a plea based on an exception could not be accepted by him in arriving at his judgment. In another decision of this Court *Ramgopal Ganpatrai Ruia & another v. State of Bombay*⁴ the

1. A.I.R. 1949 Pat. 256.

2. (1900) I.L.R. 28 Cal. 211.

3. (1951) M.L.J. (Cr.) 389; (1951) 2 S.C.J. 39; (1951) 2 M.L.J. (S.C.) 16; (1951) 2 An.

W.R. (S.C.) 16; (1951) 1 S.C.R. 1.

4. (1953) S.C.J. 266; (1953) M.L.J. (Cr.)

217; (1953) S.C.R. 618.

expression "sufficient grounds" occurring in sections 209, 210 and 213 of the Code of Criminal Procedure was considered and it was held that the expression did not mean sufficient grounds for the purpose of conviction but meant such evidence as would be sufficient to put the accused upon trial by the jury. In dealing with the first complaint the learned Chief Presidency Magistrate proceeded to consider not whether there was sufficient ground for proceeding within the meaning of sections 203 and 204 of the Code of Criminal Procedure but whether there was sufficient evidence for conviction of the accused persons. In my opinion, this approach was completely wrong and resulted in a manifest miscarriage of justice. The learned Chief Presidency Magistrate said :

"In cases depending on circumstantial evidence in order to justify any inference that an offence has been committed the incriminating facts must be incompatible with innocence of the person accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. If the circumstances are found to be as consistent with innocence as with the guilt of the accused, no inference of guilt can be drawn. In the present case the circumstances above equally may lead to the inference that the document was ante-dated and might or might not have been forged. Therefore the circumstances are not precise to be of any value as evidence."

These observations clearly show that the learned Chief Presidency Magistrate misdirected himself as to the true scope and effect of sections 203 and 204 of the Code of Criminal Procedure. He did not keep in mind the true purpose of the enquiry before him which was to ascertain whether there was evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the accused persons. He further failed to keep in mind that sections 203 and 204 of the Code of Criminal Procedure did not say that a regular trial for judging the guilt or otherwise of the person complained against should take place at that stage. It was not for the learned Chief Presidency Magistrate to apply the test whether the circumstances were or were not incompatible with the innocence of the accused persons. The purpose of the enquiry before him was merely to ascertain *prima facie* the truth or falsehood of the complaint. Instead of holding an enquiry into the complaint, the learned Chief Presidency Magistrate proceeded as though he was trying the case itself on merits. I consider that this mistake on the part of the learned Chief Presidency Magistrate gave a wrong direction to the whole proceedings on the first complaint and the order of dismissal passed by him was due to a manifest error and resulted in miscarriage of justice.

The second exceptional circumstance is as to the presence of the telephone number "City 6091" printed on the sheet of paper on which were typed the minutes of the proceedings dated 16th January, 1948. When the first complaint was dealt with by the Chief Presidency Magistrate no evidence was led to show that the City Exchange did not come into existence until December, 1948 and that the telephone connection relating to that particular number was obtained for the first time by the Hindusthan Co-operative Insurance Society Ltd. on or about 18th March, 1949. This, I think, would be a new matter which was not considered when the first complaint was dismissed under section 203 of the Code of Criminal Procedure. There was a good deal of argument as to whether this matter relating to the City Exchange was known to the complainant and his brothers from before, and, if so, why they did not bring it to the notice of the learned Chief Presidency Magistrate who dealt with the first complaint. It appears that an application dated 7th June, 1955, was made before Debabrata Mookerjee, J. who heard the application in revision with regard to the first complaint. In that application certain statements were made with regard to the City Exchange. Those statements did not, however, include any averment as to the knowledge of the complainant, Promode Ranjan Sarkar, about the facts relating to the City Exchange and telephone number "City 6091". The application merely stated that the facts stated therein were matters of public history and it was essential in the ends of justice to take judicial notice thereof. Debabrata Mookerji, J., apparently rejected this application but did not record any formal orders on that date. He recorded formal orders after he had

dismissed the application in revision. He said therein that he was not prepared to take into consideration the facts alleged in the application dated, 7th June, 1955, as they related to *new matters*. The argument on behalf of the appellants before us is that the facts relating to the City Exchange were not new matters, because the complainant, Saroj Ranjan Sarkar, nowhere said that he did not know them before. The argument, therefore, is that it does not fulfil the test of "new facts which the complainant have no knowledge of or could not with reasonable diligence have brought forward in the previous proceedings." The learned Advocate for the respondent has, in my opinion, rightly submitted that it is somewhat illogical to say at one stage of the proceedings that the matter was a new matter and could not, therefore, be taken into consideration and at a later stage to say that it is not a new matter and therefore could not be taken into consideration.

This much, however, is clear that the matter relating to the City Exchange and in particular telephone number "City 6091" was not at all considered when the first complaint was dismissed under section 203 of the Code of Criminal Procedure. This matter is of some importance because if there was no such telephone number on 16th January, 1948, the minutes of the proceedings purporting to be of that date must have come into existence on a latter date. This would have great relevance and bearing on the allegation of forgery made with regard to the minutes of the proceedings dated 16th January, 1948.

On behalf of Saurindra Mohan Basu it was further contended that there was not even *prima facie* evidence against him and the learned Chief Presidency Magistrate was wrong in issuing process against him. It is only necessary to point out that the learned Chief Presidency Magistrate found that there was a *prima facie* case against Saurindra Mohan Basu. He had attested the signature of the late Nalini Ranjan Sarkar and if that signature was forged, then that would be *prima facie* evidence against Saurindra Mohan Basu also.

My learned brethren have taken the view that the entertaining of the second complaint in the circumstances of this case is a gross abuse of the processes of the Court. I find myself unable to subscribe to that view. My conclusion is just the opposite, namely, that the entertaining of the second complaint fully serves the interests of justice. I am further of the opinion that its dismissal would defeat the ends of justice. In this connection, I have already referred to the two exceptional circumstances which exist: one is that the learned Chief Presidency Magistrate who dealt with the first complaint completely misdirected himself as to the true scope and effect of sections 203 and 204 of the Code of Criminal Procedure; the second is that Debabrata Mookerjee, J., wrongly refused to take into consideration the circumstances relating to the installation of the City Exchange and telephone number "City 6091", circumstances which had a decisive bearing on the allegation of forgery made with regard to the minutes of the proceedings dated 16th January, 1948. Even a cursory perusal of the order of the Chief Presidency Magistrate (Shri N.C. Chakravarti) dated 6th August, 1954 with regard to the first complaint shows that the learned Chief Presidency Magistrate proceeded on the footing as though he was trying a case based entirely on circumstantial evidence; he formulated the tests for drawing conclusions from circumstantial evidence and applying those tests, he came to the conclusion that the complaint was not true. He rejected the evidence of the hand-writing expert as though it was his function to try the case. He rejected the enquiry report of Shri A.B. Syam (who held that there was a *prima facie* case for the issue of process) on very insufficient grounds. He even went to the length of judging for himself the peculiar characteristics of Nalini Ranjan Sarkar's hand-writing depending on the personality of the writer. In my view, in all these matters the learned Chief Presidency Magistrate misdirected himself as to the true scope of the enquiry before him and he forgot that what he had to find was whether *prima facie* there was believable evidence in support of the allegations made in the complaint. This does not necessarily mean that a Magistrate dealing with a complaint is obliged "to bind himself to a mere mechanical or a wholly uncritical acceptance of the complainant's story." Indeed, it is the duty of the Magistrate to judge the materials

on which he has to make up his mind as to the sufficiency or otherwise of the ground for proceeding further with the complaint and in judging the materials he must sift them and submit them to a critical examination. This aspect of the question was argued before Debabrata Mookerjee, J. and he referred to it in his judgment. I say this without meaning any disrespect to the learned Judge, but it appears to me that he missed the distinction which was pointed out by this Court in *Ramgopal Ganpatrai Ruia & another v. The State of Bombay*¹, namely, that the expression "sufficient grounds" occurring in sections 209, 210 and 213 of the Code of Criminal Procedure does not mean sufficient grounds for the purpose of conviction, but means such evidence as is sufficient to put the accused person upon trial by the jury. In sections 203 and 204, Criminal Procedure Code, the expression is "sufficient ground for proceeding" which really means sufficient ground for proceeding with the complaint. Sufficient ground for proceeding with the complaint is one matter and sufficient ground for convicting an accused person is quite a different matter. It is this distinction which has to be kept in mind and the failure to keep such a distinction in mind in the present case has resulted in a manifest error. Debabrata Mookerjee, J. detailed seven circumstances as those on which the complainant relied in support of the allegation of forgery. He then went on to deal those circumstances as though the function of the Court then was to find out whether there was sufficient ground for convicting the accused persons. I refer particularly to the view expressed by the learned Chief Presidency Magistrate to the effect that one of the documents in question might have been ante-dated by Naliní Ranjan Sarkar himself. This was a suggestion made on behalf of the accused persons as a possible defence to the charge of forgery and it was not the function of the Chief Presidency Magistrate to consider the defence at that stage. Debabrata Mookerjee, J. himself said :

"If, on the other hand, the Magistrate has met the facts alleged by the complainant by anticipating possible defences to the charge, thus travelling beyond the facts themselves and the inferences and the probabilities legitimately raised by them, he must be held to have exceeded the allowable limits of an initial test of the complainant's story."

Yet, the possible defence that Naliní Ranjan Sarkar might have himself ante-dated the document was not only considered by the learned Chief Presidency Magistrate but was accepted by Debabrata Mookerjee, J. ! This, in my opinion, clearly demonstrates the manifest error or injustice which has taken place in this case, though in the concluding part of his judgment Debabrata Mookerjee, J. expressed the view that he did not consider that the learned Chief Presidency Magistrate had over-stepped the permissible limits of preliminary probe into the truth or otherwise of the complainant's story. He further said that in his view the learned Chief Presidency Magistrate in sifting the materials offered did not dispose of them by anticipating a possible defence of the parties ; yet the one possible defence to the charge of forgery was that Naliní Ranjan Sarkar might himself have ante-dated the document in question and that very defence was considered and accepted not only by the learned Chief Presidency Magistrate but by Debabrata Mookerjee, J. also.

The second mistake which led to a manifest injustice was the refusal to take into consideration the circumstances relating to the installation of the City Exchange and the telephone number "City 6091". Debabrata Mookerjee, J. made no orders on the application dated 7th June, 1955. In his final order he said :

"The application speaks for itself. I was not prepared on that date to take any notice of the new matters mentioned in that application and I adhere to my decision."

In my view Debabrata Mookerjee, J. was grievously in error in rejecting the application. As I have said earlier, the circumstances relating to the installation of the City Exchange and telephone number "City 6091" had a decisive bearing on the truth or otherwise of the allegation of forgery and to reject the application to take those circumstances into consideration really amounted to a denial of justice. Debabrata Mookerjee, J. took the view that it was a new matter which could not be taken

1. (1953) S.C.J. 266 : (1958) M.L.J. (Cr.) 217 : (1958) S.C.R. 618.

into consideration and, paradoxically enough, the argument before us is that not being a new matter, it should not have been taken into consideration in connection with the second complaint. This paradox clearly demonstrates the injustice that will result from a failure to take into consideration circumstances which are decisive of the allegations made in the complaint. When the complainant made an application for a certificate for appeal to the Supreme Court against the order passed by Debabrata Mookerjee, J., he forcefully contended that the refusal to take notice of the circumstances relating to the installation of the City Exchange amounted to a denial of justice. This application was dealt with by a Bench of two Judges of the Calcutta High Court (Das Gupta and Bachawat, JJ.). The learned Judges expressed the view that if they were dealing with the matter, they would have thought it right to refer to the appropriate books for ascertaining the date on which the City Exchange came into existence. They, however, felt that the matter was within the discretion of Debabrata Mookerjee, J. and they were not prepared to give a certificate in a matter of discretion. Another point which was urged before that Bench was this. The complaint was for offences triable by the Court of Sessions and the question which the learned Chief Presidency Magistrate had to put to himself was not whether he, for himself, believed the allegations to be true but whether the materials before him were such that thereupon a reasonable body of men might believe the allegations to be true. The learned Judge said :

"In our judgment there is considerable force in this argument, but at the same time we have to take notice of the fact that this question does not appear to have been decided by the Courts."

Since those observations were made, a decision has been given by this Court and that decision supports the contention urged on behalf of the complainant. The matter then came to this Court on an application for Special Leave, and Special Leave was granted by this Court on 13th February, 1956. An appeal was filed in pursuance of that Special Leave, but ultimately Pramode Rajan Sarkar withdrew his appeal by filing a petition on 3rd February, 1959. In that petition he stated that at the intervention of common friends and well-wishers of the parties, he had settled his disputes with the respondents therein and did not want to proceed with the appeal, a statement which, in the circumstances of this case, amounts almost to compounding a felony. The appeal was accordingly withdrawn on 12th March, 1959. The present complainant, Saroj Ranjan Sarkar, alleged in his petition of complaint that the withdrawal of the appeal filed in this Court in the circumstances stated above was due to undue influence exercised by the accused persons. Whether that allegation is correct or not can only be determined after evidence has been led. There are, however, circumstances which seem to me to indicate that the withdrawal of the appeal in this Court was for the purpose of defeating the ends of justice. The accused persons must have realised that if the evidence relating to the installation of the City Exchange and telephone number "City 6091" was available and considered, then there would be no escape from the position that the minutes of the proceedings of the Board meeting of N. R. Sarkar & Co., Ltd., dated 16th January, 1948 must have been forged and this aspect of the matter was very rightly emphasised by the learned Chief Presidency Magistrate (Shri Bijayesh Mukherjee) who dealt with the second complaint as also by the Special Bench of three Judges who dealt with the matter on the revision applications made against the order of the learned Chief Presidency Magistrate on the second complaint. It is also worthy of note that this Court must have granted Special Leave in respect of the order passed on the first complaint, because it felt that there were arguable points in support of the application for Special Leave, one of such points apparently being the refusal to consider the circumstances relating to the installation of the City Exchange. On the second complaint the learned Chief Presidency Magistrate, as also the High Court, took those circumstances into consideration and rightly held that those circumstances clearly indicated that the allegations made in the complaint were *prima facie* true. The learned Chief Presidency Magistrate further held that having regard to the antecedent circumstances, there was no undue delay in filing the second complaint. He further held that there was no intention to blackmail, in the sense that one

brother having failed on the first complaint, another brother was fraudulently trying to start afresh the criminal law in motion. These findings of the learned Chief Presidency Magistrate were accepted by a Special Bench of three Judges of the Calcutta High Court. I have heard nothing in the course of the arguments addressed before us which would justify me to go behind those findings, particularly in an appeal filed by Special Leave under Article 136 of the Constitution. The learned Chief Presidency Magistrate and a Bench of three Judges of the Calcutta High Court held specifically on the second complaint that there was a *prima facie* case and the dismissal of the first complaint resulted in manifest injustice. I see no reasons to differ from the view thus expressed by the learned Chief Presidency Magistrate and the High Court.

For these reasons I have come to the conclusion that there are no good grounds for interfering with the judgment and order of the Special Bench dated 22nd/23rd, December, 1960. I would accordingly dismiss the two appeals.

Kapur, J. (for himself and Hidayatullah, J.).—These are two appeals against the judgment and order of the High Court of Calcutta which raise the question of competency of a second complaint in regard to the same matter after the first complaint has been dismissed under section 203 of the Code of Criminal Procedure. The respective appellants in the two appeals are P. N. Taluqdar and Sourindra Mohan Basu an Attorney of Calcutta against whom process has been issued by the Chief Presidency Magistrate, Calcutta on a complaint filed by the respondent Saroj Ranjan Sarkar.

The facts of these appeals are these : In 1944 a private limited company—N. R. Sarkar & Co., Ltd.—was formed by the late Mr. N. R. Sarkar, who was a well-known financier and industrialist and a public man of Bengal. This company was the Managing Agent of several public limited companies such as Hindusthan Development Corporation, Ltd., Hindusthan Chemicals, Limited, Hindusthan Pilkington Glass Works, Limited, etc. Mr. N. R. Sarkar was the Managing Director of N. R. Sarkar & Co., Ltd. Out of the share capital of this company he held 4,649 shares. His younger brother Pramode Ranjan Sarkar held 50 shares. Appellant P. N. Taluqdar who was a paid employee of the Hindusthan Co-operative Insurance Co., Ltd. held 300 shares and was a director of the Company and Shanti Ranjan Sarkar, a son of N. R. Sarkar's deceased brother, held one share. As Mr. N. R. Sarkar became the Finance Minister in the West Bengal Government, he obtained leave of absence on 4th January, 1948 from the directors of N. R. Sarkar & Co., Ltd., for a period of one year which was subsequently extended for another year. This was by a resolution passed on 10th March, 1948. Mr. N. R. Sarkar joined the Government on 23rd January, 1948 and in August, 1948 Dr. N. N. Law became a director of N. R. Sarkar & Co., Ltd.

On 31st July, 1951, Mr. N. R. Sarkar executed a deed of trust in respect of 2,920 shares out of his holding in Hindusthan Co-operative Society, Ltd. and 3,649 shares out of the shares held by him in N. R. Sarkar & Co., Ltd. By this deed he appointed as trustees his younger brother Pramode Ranjan Sarkar, appellant P. N. Taluqdar and Dr. N. N. Law and the beneficiaries under the trust deed were his four younger brothers including the complainant and Shanti Ranjan Sarkar, his nephew. It is alleged that the balance of 1,000 shares was to be kept in trust by the appellant P. N. Taluqdar for the benefit of his brothers and nephew. N. R. Sarkar died on 25th January, 1953.

It is alleged that a few days after the death of Mr. N. R. Sarkar, the appellant, Sourindra Mohan Basu, in a casual manner informed Pramode Ranjan Sarkar that his brother N. R. Sarkar had executed two documents one an unregistered deed of agreement dated 19th January, 1948 appointing the appellant P. N. Taluqdar as the Managing Director of N. R. Sarkar & Co., Ltd. and a deed of transfer dated 5th February, 1951 transferring 1,000 shares in N. R. Sarkar & Co., Ltd. in his

(P. N. Taluqdar's) favour. Pramode Ranjan Sarkar and his brothers without giving much credence to this information wanted to see the documents but they were not allowed to do so. On 31st July, 1953 appellant P. N. Taluqdar resigned from the Hindusthan Co-operative Insurance Society, Ltd. in order to take control of N.R. Sarkar & Co., Ltd. as its Managing Director. This led to trouble between Pramode Ranjan Sarkar and the appellant P. N. Taluqdar and there was some correspondence between Pramode Ranjan Sarkar and the appellant P. N. Taluqdar which it is unnecessary to refer to. At a meeting of the Board of Directors of N. R. Sarkar & Co. held on 22nd September, 1953 the appointment of the appellant P. N. Taluqdar as Managing Director of N. R. Sarkar & Co., Ltd., was renewed for a period of seven years. This was in spite of the protest of Pramode Ranjan Sarkar and in spite of the fact that that item was not on the agenda of the meeting.

On 1st October, 1953, Pramode Ranjan Sarkar took inspection of the agreement. On 13th October, 1953 he took inspection of the Minute book and took photostat copies of some of the documents but not of the resolution of 16th January, 1948. It is alleged that the appellants and others entered into a criminal conspiracy and fraudulently forged certain documents which in the complaint are described thus :

“(a) An unregistered deed of agreement purporting to have been executed by the late Sri Nalini Ranjan Sarkar as Governing Director of N. R. Sarkar & Company, Limited on 19th January, 1948 (while he was on leave as stated above) appointing accused No. 1 (P. N. Taluqdar) as the Managing Director of N. R. Sarkar & Company, Limited on a remuneration of Rs. 1,500—100—2,000 per month and the deed bears the signatures of accused No. 2 (S. M. Basu) as the sole attesting witness.

(b) A transfer deed in respect of 1,000 shares of N. R. Sarkar & Company, Limited which has been entrusted to accused No. 1 as stated before, transferring them to accused No. 1 for an alleged consideration of Rs. 1,00,000 (Rupees one Lakh) also purporting to have been executed by the late Sri Nalini Ranjan Sarkar on 5th February, 1951 with accused No. 2 as attesting witness both for the transferor and transferee.

(c) Minutes of the proceedings of the Board Meetings of the said N. R. Sarkar & Company, Limited including those of a meeting dated 16th January, 1948, purporting to bear the signature of the aforesaid late Sri Nalini Ranjan Sarkar.”

These documents, it is alleged, are forged and have been used and by the use of these forged documents a fraud has been perpetrated. On 3rd April, 1959 the respondent filed in the Court of the Chief Presidency Magistrate, Calcutta, a complaint under sections 467, 471 read with section 109 of the Indian Penal Code against the two appellants, Dr. N. N. Law and A. Chakravarti. Document No. (b) above is not the subject-matter of the complaint because a suit in regard to it has been filed and is pending in the Calcutta High Court. On 7th May, 1959, process was issued against the appellants by the Chief Presidency Magistrate. Before dealing with the allegations in this complaint it is necessary to give some further facts of the case.

On 12th December, 1953 Pramode Ranjan Sarkar laid an information with the Commissioner of Police, Calcutta, against the persons against whom the above-mentioned complaint was later filed. It appears that the matter was investigated by the police and by a letter dated 16th February, 1954, the Police Commissioner expressed the opinion that there was no substance in the allegations which were being made by Pramode Ranjan Sarkar against the appellants and two others. He stated,

“.....I have given this matter very careful consideration, gone through various reports and papers and even examined an important witness myself. My examination has led me to conclusion that allegations are false and vexatious.”

On 17th March, 1954 Pramode Ranjan Sarkar filed a complaint under sections 467, 471 and sections 467, 471 read with section 109. After setting out the facts which have been given above and after referring to the three documents which were alleged to have been forged it was stated that the deed of agreement was engrossed on a stamp-paper purchased in the name of P. D. Himmatsinghka & Co., a firm of solicitors, instead of in the name of the parties; that the resolution of 16th January, 1948, which purported to bear the signature of the deceased was in fact

not signed by him ; that during the lifetime of Nalinî Ranjan Sarkar and after a considerable period after his death appellant, P. N. Taluqdar, never alleged that he had been appointed the Managing Director of N. R. Sarkar & Co., Ltd. nor did it even appear from any resolution of the Board of N. R. Sarkar & Co. that he was appointed the Managing Director until September, 1953. Certain other allegations which need not be set out at this stage were also made in this complaint for the purpose of showing that the appellants had been guilty of forgery and for using forged documents and for conspiracy. The matter was heard by the Chief Presidency Magistrate Mr. N. C. Chakraborty who after examining all the witnesses who were produced before him dismissed the complaint by an order dated 6th August, 1954. The learned Chief Presidency Magistrate examined the Handwriting Expert and after taking all the facts into consideration he held :

“ that the evidence on handwriting including the opinion of the Handwriting Expert does not support the complainant's version.”

Against this order the complainant Pramode Ranjan Sarkar took a revision to the Calcutta High Court which was heard by Debabrata Mookerjee, J. Before him three contentions were raised : (1) that the Chief Presidency Magistrate erred in examining the witnesses himself after he had received the result of the enquiry held by Mr. A. B. Shyam another Magistrate under section 202, Code of Criminal Procedure ; (2) the learned Magistrate misunderstood the scope of sections 202 and 203 and misdirected himself by insisting upon a standard of proof which the law did not require at the initial stage when the only question was whether the process should issue or not and the third contention related to the power of revision of High Court under section 439 when dealing with orders of a Chief Presidency Magistrate. The learned Judge held against the complainant, Pramode Ranjan Sarkar on the points that were raised before him. He held that (1) it was open to the Chief Presidency Magistrate to examine witnesses ; (2) the learned Magistrate had not misdirected himself in regard to the scope of sections 202 and 203 and that he could dismiss the complaint if in his judgment there was no sufficient ground for proceeding. He also held that the order of Magistrate was liable to be interfered with if it was made in disregard of the rules of procedure or it was so grossly improper or so palpably incorrect as to require a revision in the interest of justice. The learned Judge then examined the evidence which had been produced before the Magistrate and taking the various circumstances into consideration discharged the rule and dismissed the revision, holding that the complainant Pramode Ranjan Sarkar was guilty of undue delay in taking action against the appellants, because he came to know on 13th October, 1953 as to the forged nature of the documents and did not take any action till he wrote to the Police Commissioner to which he got reply on 16th February, 1954 and he did not file any complaint or take any action till 17th March, 1954 and this delay was unexplained. He also held that the complainant Pramode Ranjan Sarkar's belief in regard to forgery was not established by the evidence which had been produced because (1) he came to know about the agreement complained of in February, 1953 but he discredited it and did not take any action ; (2) that when the agreement came up for renewal on 22nd September, 1953 for another term of 7 years he did not oppose it on the ground that it was a forgery but on legal grounds. The learned Judge did not believe the evidence of Pramode Ranjan Sarkar that up to February, 1954 he considered it absurd that there could be such a document. He referred to the correspondence which passed between the complainant and the appellant P. N. Taluqdar. He also considered the evidence relating to the water mark and the circumstances in support of the allegation of the theory of forgery and not being satisfied with the evidence he dismissed the revision petition and thus the order of the Chief Presidency Magistrate Mr. Chakraborti was upheld. It may be pointed out that on behalf of complainant Pramode Ranjan Sarkar an application was made on 6th June, 1955 drawing the attention of the Court to the fact that on the sheet of a paper on which the minutes of the meeting held on 16th January, 1948, had been typed there was printed Telephone “ City 6091 ” and that Exchange had not come into existence till December, 1948. It was not stated when

the complainant came to know of this fact. The learned Judge did not pass any separate order on this application and did not take it into consideration in his judgment.

Against this order an application was made for a certificate under Article 134 (1) (c) which was dismissed but in that Order this fact as to the City Exchange coming into existence in December, 1948 has been taken note of. Pramode Ranjan Sarkar then applied to this Court for Special Leave which was granted on 13th February, 1956 but the appeal was withdrawn and was therefore dismissed on 2nd March, 1959.

The present respondent Saroj Ranjan Sarkar then brought a complaint under the same sections on 3rd April, 1959 making the same allegations as were made by his elder brother Pramode Ranjan Sarkar but there is one further allegation as to the Telephone City Exchange which did not find place in the previous complaint. In this complaint after referring to the facts which have been set out above, it was alleged in paragraph 5 as follows :—

“That in order to assume complete control over N. R. Sarkar & Co., Ltd., and the concerns under its Managing Agency, the accused entered into a criminal conspiracy with each other and others unknown, to dishonestly and fraudulently forge a Deed of Agreement, a Deed of Transfer and make a false document, to wit, minute book of N. R. Sarkar & Co., Ltd., and in pursuance thereof dishonestly and fraudulently forged and/or caused to be forged and used as genuine the said documents.”

The grounds for forgery were that the unregistered deed dated 19th January, 1948 was engrossed on a stamp paper purchased in the name of Messrs. P. D. Himmatsinghka & Co.; that the late N. R. Sarkar was on leave granted by the company and he never attended any meeting of the Board for more than four years as long as he was a Finance Minister; that the signature of Mr. N. R. Sarkar on the resolution dated 16th January, 1948 was forged; that during the lifetime of N. R. Sarkar it was never given out by the appellant P. N. Taluqdar that he had been appointed a Managing Director; that in none of the papers and correspondence and resolutions of the Board until September, 1953 does it appear that the appellant, P. N. Taluqdar, was its Managing Director; that the appellant, P. N. Taluqdar continued to hold his post in the Hindusthan Co-operative Insurance Society, Ltd. up to the end of July, 1953; that the signature in the deed of appointment was halting and appeared to be a forgery even to the naked eye; that the resolution for renewal for seven years was passed in spite of the protest of Pramode Ranjan Sarkar who was a director of N. R. Sarkar & Co., Ltd. and inspection of the deed of appointment was not given to Pramode Ranjan Sarkar in spite of his demands. It was further alleged that the resolutions of the Board of Directors were all on loose sheets of paper; that the signature on the resolutions were forged; that there was internal evidence to show that the genuine minutes book had been dishonestly changed; that the minutes of the proceedings of the Board of Directors said to have been held on 16th January, 1948 were on a typed sheet; that the Telephone No. “City 6091” was printed thereon and the City Exchange was not in existence in January, 1948 but came into existence in December, 1948. It was prayed that the accused named therein which included the two appellants be proceeded against under sections 467, 471 read with section 109 of the Indian Penal Code. It will be noticed therefore that all the allegations made by Saroj Ranjan Sarkar are the same as those made by Pramode Ranjan Sarkar except in regard to the City Exchange Telephone Number.

This complaint was accompanied by an affidavit not of complainant Saroj Ranjan Sarkar but of Shanti Ranjan Sarkar, his nephew. In paragraphs 1 to 7 of this affidavit he stated that the facts in regard to the Calcutta City Exchange were matters of public history as they were duly published in the columns of “Statesman” dated 29th December, 1948 and he also stated “that I am aware of the facts and circumstances stated above,” but he did not say as to when he came to know about the City Exchange matter. It may also be noted that in the application which was made by the complainant Pramode Ranjan Sarkar in the High Court before Debabrata Mookerjee, J., it was submitted that judicial notice be taken of the new Telephone Exchange under section 57 of the Evidence Act but it was not stated as

to when that complainant came to know about the new Telephone Exchange Number. That fact has been stated in the affidavit of Shanti Ranjan Sarkar in almost the same vague manner.

The learned Chief Presidency Magistrate, who took cognizance of the second complaint Mr. Bijoyesh Mookerjee, after considering the whole material placed before him issued process against the appellants only. He held that there was no delay on the part of the respondent in making the complaint; that the previous complaint and the result thereof was no bar to the filing of the second complaint; that the complaint was not brought with a view to blackmail the accused including the appellants; that what the brother of the respondent did, did not lay the respondent open to the charge of blackmail. On the merits he took into consideration the fact in regard to the City Exchange of which according to the learned Magistrate he could take judicial notice under section 57 of the Evidence Act. He compared various signatures of the late N. R. Sarkar and after considering the elaborate order of his predecessor he said :—

“I have read and re-read it and with respect too due to one of his eminence, but it is my misfortune that I have not been persuaded. There are various other considerations which point to the indubitable *prima facie* conclusion of forgery. But it is not proper that I burden my order with all that at this stage.”

He held that he was satisfied about the truth of the allegations and there was sufficient ground for proceeding against the appellants under section 204, Criminal Procedure Code and he therefore issued process against them but did not issue any process against Dr. N. N. Law and Amiya Chakravarty who were accused Nos. 3 and 4.

Against this order a revision was taken by the appellants to the High Court and rule was issued against the Chief Presidency Magistrate to show cause why his order should not be set aside. He showed cause and the matter was heard by a Division Bench consisting of P. B. Mukerjee and H. K. Bose, JJ. and the matter was referred to a larger Bench because of the importance of the questions of law which arose in the case.

Three questions were raised before the Special Bench : (1) whether under the Appellate Side Rules of the High Court it was competent for a Division Bench consisting of two Judges to refer any matter to a larger Bench for decision in a criminal matter; (2) whether a second complaint could be entertained on the same facts after a previous complaint had been dismissed; and (3) whether the complaint could be taken cognizance of by the Magistrate in the absence of a sanction under section 196-A of the Criminal Procedure Code. On all these three points the finding of the Special Bench was against the appellants. It held that the attention of the Chief Justice having been drawn to the fact that the case involved questions of importance it was open to him in the exercise of his inherent jurisdiction to refer the case to a larger Bench and therefore the reference was not illegal. In regard to the filing of a second complaint it held that a fresh complaint could be entertained after the dismissal of previous complaint under section 203, Criminal Procedure Code when there was manifest error or manifest miscarriage of justice or when fresh evidence was forthcoming. The Bench was of the opinion that the fact in regard to the City Telephone Exchange was a new matter and because Pramode Ranjan Sarkar was not permitted to take a photostat copy of the Minutes Book, it was possible that his attention was not drawn to the City Telephone Exchange which was not in existence at the relevant time and that there was sufficient reason for Pramode Ranjan Sarkar for not mentioning the matter of City Exchange in his complaint. It also held that the previous Chief Presidency Magistrate Mr. Chakraborty had altogether ignored the evidence of a large number of witnesses who were competent to prove the handwriting and signature of N. R. Sarkar and he had no good reasons for not accepting their evidence. It could not be said therefore that there was a judicial enquiry of the matter before the previous Chief Presidency Magistrate; the decision was rather arbitrary and so resulted in manifest miscarriage of justice. The Court was of the opinion therefore that there was no reason to differ from the finding of the Chief Presidency Magistrate Mr. Bijoyesh Mukerjee and that there was a *prima facie* case against the appellants. The rules were therefore discharged. It is

against this judgment and order that the appellants have come in appeal to this Court by Special Leave.

Four appeals were filed by the two appellants, two against the order of the High Court of Calcutta dismissing the revision petition and two against the order of the High Court refusing a certificate under Article 134 (1) (c) of the Constitution. As this Court granted Special Leave against the order of the High Court dismissing the Revision Petition the two appeals against the order refusing a certificate under Article 134 (1) (c) became infructuous and therefore were not pressed. It is only the appeals against the judgment and order of the High Court refusing to quash the order of the learned Chief Presidency Magistrate, Mr. Bijoyesh Mukerjee, which survive for decision.

The first question to be decided and that is the most vital question in the case is, whether the second complaint filed by Saroj Ranjan Sarkar respondent should have been entertained? This complaint was brought on 3rd April, 1959, the appeal in this Court brought by Pramode Ranjan Sarkar, the complainant in the previous complaint, having been withdrawn on 2nd March, 1959. The respondent holds no shares in N. R. Sarkar & Co., Ltd. He is a beneficiary under the deed of trust in regard to certain number of shares. In regard to the unregistered deed of agreement appointing P. N. Taluqdar as Managing Director of N. R. Sarkar & Co. Ltd., he can have no interest. As regards the transfer deed of 1,000 shares of N. R. Sarkar & Co., Ltd., which it is claimed were entrusted to P. N. Taluqdar appellant for the benefit of the respondent and his brothers, a separate suit has been brought and is not the subject-matter of the criminal complaint. There then remains the resolution of the Board dated 16th January, 1948 which stands on the same footing as the appointment to the Managing Directorship and is connected with that matter and relates to it.

Under the Code of Criminal Procedure the subject of "Complaints to Magistrates" is dealt with in Chapter XVI of the Code of Criminal Procedure. The provisions relevant for the purpose of this case are sections 200, 202 and 203. Section 200 deals with examination of complainants and sections 202, 203 and 204 with the powers of the Magistrate in regard to the dismissal of complaint or the issuing of process. The scope and extent of sections 202 and 203 were laid down in *Vadilal Panchal v. Dattatraya Dulaji Chadigaonker & another*¹. The scope of enquiry under section 202 is limited to finding out the truth or otherwise of the complaint in order to determine whether process should issue or not and section 203 lays down what materials are to be considered for the purpose. Under section 203, Criminal Procedure Code the judgment which the Magistrate has to form must be based on the statements of the complainant and of his witnesses and the result of the investigation or enquiry if any. He must apply his mind to the materials and form his judgment whether or not there is sufficient ground for proceeding. Therefore if he has not misdirected himself as to the scope of the enquiry made under section 202, Criminal Procedure Code, and has judicially applied his mind to the material before him and then proceeds to make his order it cannot be said that he has acted erroneously. An order of dismissal under section 203, Criminal Procedure Code is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g., where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced. It cannot be said to be in the interests of justice that after a decision has been given against the complainant upon full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into. *Allah Ditta v. Karam Baksh*²; *Ram Narain Chaubey v. Panachand Jain*³; *Hansabai v. Ananda*⁴; *Doraisami v. Subramania*⁵.

1. (1961) 2 S.C.J. 39 : (1961) 2 M.L.J. (S.C.) 16 : (1961) 2 An.W.R. (S.C.) 16 : (1961) M.L.J. (Cr.) 389 : (1961) 1 S.C.R. 1, 9, 10, 2. I.L.R. 12 Lah. 9, 12.

3. A.I.R. 1949 Pat. 256.
4. A.I.R. 1949 Bom. 384.
5. A.I.R. 1918 Mad. 484.

In regard to the adducing of new facts for the bringing of a fresh complaint the Special Bench in the judgment under appeal did not accept the view of the Bombay High Court or the Patna High Court in the cases above quoted and adopted the opinion of Maclean, C.J., in *Queen Empress v. Dolegobinda Das*,¹ affirmed by a Full Bench in *Dwarka Nath Mandal v. Benimadha Banerji*². It held therefore that a fresh complaint can be entertained where there is manifest error, or manifest miscarriage of justice in the previous order or when fresh evidence is forthcoming.

The Chief Presidency Magistrate in the complaint filed by the respondent, held that the second complaint was not unduly delayed ; that section 203 is not a bar to the second complaint and that the complaint was not with a view to black-mail the persons accused. On the merits he held that the minutes of the proceedings of 16th January, 1948, were typed on a sheet of paper with Telephone No. "City 6091" and the City Exchange came into existence later in the year and that on his comparing the signatures of N.R. Sarkar it appeared that the signature was a forgery. He said :

"And governing myself by this test, I hold that forgery is there *prima facie* and only *prima facie*."

These then were the two facts on which the learned Presidency Magistrate Mr. B. Mukerjee came to a conclusion different from that of his predecessor M. Chakraborty, who had enquired into the complaint of Pramode Ranjan Sarkar, as to the forged nature of the signatures of Mr. N.R. Sarkar.

Taking first the question of fresh evidence, the view of some of the High Courts that it should be such that it could not with reasonable diligence have been adduced is, in our opinion, a correct view of the law. It cannot be the law that the complainant may first place before the Magistrate some of the facts and evidence in his possession and if he fails he can then adduce some more evidence and so on. That, in our opinion, is not a correct view of the law.

The next point to be considered is, was the mention of the telephone number "City 6091" on the note paper on which the resolution was typed a matter of which the previous complainant Pramode Ranjan Sarkar was unaware and was it a fact which with reasonable diligence he could not place before the Magistrate. In the complaint filed by Pramode Ranjan Sarkar no reference was made to the City Exchange. It is true that the question was sought to be raised as a fresh piece of evidence before Debabrata Mookerjee, J. and it was not considered by him but it was not stated before him when the then complainant came to know of this fact. According to a copy of the Day Book entry by Mr. Bimal Chandra Chakravarty, Solicitor for the previous complainant Pramode Ranjan Sarkar dated 13th October, 1953, photostat copies were taken of the share transfer deed and portions of the agreement dated 19th January, 1948, and inspection of the Minutes Book was also taken but the request of the complainant to take photostat copies of certain resolutions was refused, by the appellant S.M. Basu. It is significant that according to this entry, Santi Ranjan Sarkar was acting as the agent of Pramode Ranjan Sarkar and was present at the time of the inspection. After this inspection was taken, Pramode Ranjan Sarkar discussed with his Legal Advisers the peculiarities noted in the impugned documents. This is what he (Pramode Ranjan Sarkar) stated as a witness before the Chief Presidency Magistrate. His evidence also shows that he inspected the Minutes Book though after much "recriminations". Witness Shibakali Bagchi stated that Minutes Book of N.R. Sarkar & Co., Ltd. was examined by him and that it appeared to him that the Book was not genuine and Pramode Ranjan Sarkar complained that some of the signatures were forged. It appears from the statement of Pramode Ranjan Sarkar that the appellant S.M. Basu did not let them take photographs of some of the pages of the Minutes Book. It is not stated by either Bagchi or Pramode Ranjan Sarkar of what documents they wanted to take photographs which were refused. In the statement of Bimal Chandra Chakravarty, the Solicitor, the same statement

1. I.L.R. 28 Cal. 211, 216.

2. I.L.R. 28 Cal. 652 (F.B.).

is made i.e. they wanted to take photographs of some documents which were not allowed to be taken. The correspondence produced by Pramode Ranjan Sarkar in his complaint proceedings shows that the Minutes Book was produced for his inspection and was inspected. Debabrata Mookerjee, J. in dealing with the resolution of 16th January, 1948, said that it was not possible on the materials available considered *prima facie* that the Magistrate's finding suffered from such a grave impropriety as to require interference by the Court. He was of the opinion that the complainant could not have been unaware of the resolution of 16th January, 1948. This he concluded from the following ; that on his own case Pramode Ranjan managed the affairs of the Company along with the appellant P. N. Taluqdar; that although the proceedings of the Board dated 22nd September, 1953, referred to the resolution of 16th January, 1948, yet the only protest made against it by Pramode Ranjan Sarkar was the alleged legal difficulties consequent on renewal of the appointment but its genuineness was not then questioned and it was questioned for the first time on 17th March, 1954, when the complaint was lodged.

Against the judgment and order of Debabrata Mookerjee, J., Special Leave to appeal to this Court was obtained and one of the points taken in the application was that the resolution was typed on a sheet of paper bearing Telephone No. "City 6091" although this Telephone Exchange did not come into existence till 28th December, 1948. It is significant that Pramode Ranjan Sarkar did not mention when he came to know about the existence of this new fact. It was not, therefore, made clear to the learned Judge at least up to that stage as to when, before or after the filing of the first complaint Pramode Ranjan Sarkar came to know about the existence of this piece of evidence to which so much importance is attached. Debabrata Mookerjee, J. also said in his judgment that the affairs of the Company were managed by Pramode Ranjan Sarkar and the appellant P. N. Taluqdar and that it was difficult to believe that he (Pramode Ranjan) had no access to the Minutes Book which showed that he himself had presided over several meetings and also that there was nothing extraordinary about the proceedings being typed on separate sheets of paper and the sheets of paper being pasted in that Minutes Book because on some of them there were his own signatures and it was difficult to believe that tampering with the records went on "systematically" for several months without Pramode Ranjan Sarkar having seen the Book or detected the tampering. It was, therefore, impossible to blame the previous Chief Presidency Magistrate if he held in those circumstances that there was no forgery in the Minutes Book or tampering with it. The following passage from the learned Judge's judgment is significant :—

"Photographs of the impugned documents were taken on the 13th October when the Minutes Book was inspected. On the last mentioned date the complainant was certain about the entire book having been tampered with ; but nothing appears to have been said about it ; no challenge made, no protest entered until full five months passed when at last the silence was broken and the complaint was lodged on the 17th March, 1954. It is of course not known what was said about it in the information to the police. These circumstances are explicit in the complainant's case. That case has only to be presented for these features to be seen, and the Magistrate could not possibly have overlooked them. His clear finding is that the Minutes Book is genuine. I am not in a position to say it is improper on a *prima facie* consideration of the evidence offered."

Dealing with the question whether the signatures of N.R. Sarkar were forged the learned Judge agreed after considering the whole evidence that the signatures were not forged.

The complaint of the present complainant Saroj Ranjan Sarkar specifically mentions the City Exchange and that it came into existence later. He also alleges that this fact was not known to the previous complainant, Pramode Ranjan Sarkar, and in support there is the affidavit of Santi Ranjan Sarkar. Significantly enough in that affidavit also it is not stated as to when the deponent came to know about this alleged new fact of the Telephone City Exchange. All that the affidavit says is that it is a matter of history and was published in the Statesman of 29th December, 1948. There is no evidence on the record to show as to when the matter of "City

Exchange" came to be known to the persons who were then and to those who are now prosecuting the criminal complaints. The document which we have referred to above i.e., the letter written by the Solicitor dated 13th October, 1953, shows that Santi Ranjan Sarkar was present as agent of Pramode Ranjan Sarkar at the time of the inspection. The complaint filed by Saroj Ranjan Sarkar states :—

"That with great difficulty the documents in question were inspected, certified true copies of the alleged resolutions of the Board meetings were obtained and photostatic copies of material portions including alleged signatures of late Sri Sarkar on the said Deed of Agreement and on the Deed of Transfer could be obtained, as will appear from correspondence in this respect."

In the complaint filed by Pramode Ranjan Sarkar exactly the same language was used in paragraph 10 of the previous complaint. If certified copies were obtained by the complainant Pramode Ranjan Sarkar and inspection was taken by Santi Ranjan Sarkar for Pramode Ranjan Sarkar and by his Solicitor and the facts are as they are stated above, it is difficult to hold that the fact in regard to the City Exchange was not known to the complainant in the first complaint and was new fact which could not, with reasonable diligence, be adduced by him.

The next question which arises is whether the order of the previous Chief Presidency Magistrate who decided Pramode Ranjan's complaint, was manifestly absurd or unjust and resulted in a manifestly unjust order. The Special Bench of the High Court has held that it was so because (1) the Magistrate ignored the evidence of a large number of witnesses who were competent to prove the handwriting and signature of the late Mr. N. R. Sarkar; (2) he "set aside" the report of the enquiring Magistrate, Mr. A.B. Syam for reasons which cannot be held to be proper and judicial reasons; (3) He said in his order that Mr. N. R. Sarkar might himself have ante-dated the documents thus accepting a possible defence for which there was no basis before him; and (4) he relied upon his own comparison of the disputed signature of Mr. N. R. Sarkar. On these grounds the Special Bench was of the opinion that the decision of the first Magistrate was rather arbitrary and so resulted in manifest miscarriage of justice. The question is whether Mr. N.C. Chakrabarti the previous Presidency Magistrate had applied his mind to the evidence which was produced before him and keeping in view his functions as a Magistrate, he gave his decision. It is not necessary to refer to the various findings given by him. They are set out and considered in the judgment of Debabrata Mookerjee, J., and he (that learned Judge) has commented upon all the infirmities in that order which were brought to his notice.

The previous Chief Presidency Magistrate found that the deed of Agreement dated 19th January, 1948, was not a forged document. He referred to the evidence without analyzing it. He said that the complainant examined persons who knew the signature of the late Nalini Ranjan Sarkar and they deposed as to the manner in which Nalini Ranjan Sarkar used to sign. After making a reference to the gist of the evidence submitted before him and to the report of Mr. A.B. Syam, Presidency Magistrate, he (the learned Chief Presidency Magistrate) came to the conclusion:

"For the reasons above, I find that the evidence on handwriting including the opinion of the Handwriting Expert does not support the complainant's version."

Again in a later part of his order he found that the resolution of the Board of Directors dated 16th January, 1948, also was not forged and that the endorsement of the appellant S.M. Basu was nothing more or less than the authentication of the common seal of the Company and he, therefore, agreed with the finding of Mr. A. B. Syam that there was no case against S.M. Basu, appellant but disagreed with him in regard to the other appellant, P.N. Talukdar. When the matter went to the High Court, Debabrata Mookerjee, J. first considered as to when the revisional power of Court to interfere should be exercised. Then he discussed the seven circumstances which were relied upon by the then complainant Pramode Ranjan Sarkar in support of the allegations of forgery. After dealing with these various points raised he held :

"It may be that one or two items of evidence were not specifically referred to in the order but that does not necessarily imply that those items of evidence were not present to the mind of the Magistrate."

After all a Magistrate is only required to record briefly his reasons for dismissing a complaint. The Magistrate's order, I think, is fairly well."

The learned Judge then discussed the question of delay and held that Pramode Ranjan Sarkar had considerably delayed the bringing of the complaint. He also held that the Deed of Agreement which was alleged to be a forgery had not been so proved and he gave various reasons, one of them being that at the meeting of the Board of Directors dated 22nd September, 1953, the then complainant did not oppose the renewal on the ground that the Agreement was forged or did not exist, but on legal grounds. Then the learned Judge referred to the correspondence which had passed between the then complainant Pramode Ranjan Sarkar and the appellant P.N. Talukdar and said :

"It is therefore clear that the evidence which the complainant offered in support of his case contained *prima facie* on the first aspect sufficient materials for distrusting the truth of the story and I cannot see how the Magistrate's order can be challenged in revision on the ground of impropriety as respects the deed of Agreement."

The learned Judge then referred to the other aspects of the case *i.e.*, the evidence of the Deputy Controller of Stationery, P.W. 15. He also referred to the finding of the previous Chief Presidency Magistrate that it was difficult to believe that the complainant should have been unaware of the resolution of 16th January, 1948 and after referring to all these various questions raised, he dismissed the petition.

Can it be said in these circumstances that there has been a manifest error resulting in the passing of an unjust order? That, in our opinion, has not been made out. The order of Debabrata Mookerjee, J. who reviewed the findings of the previous Chief Presidency Magistrate, shows that the criticism that that learned Magistrate did not consider the whole evidence is not justified. Taking the evidence into consideration he came to the conclusion that there was no ground to proceed, and, therefore, refused to issue process. In his opinion the evidence was not worthy of credit and he was not satisfied with the correctness of the complaint and dismissed it at he was entitled to do on those findings. See *Gulab Khan v. Ghulam Mohammad Khan*¹, which was approved in *Vadilal Panchal v. Dattatraya Dulaji Chhadigaonker and another*². In the circumstances the order made by the previous Chief Presidency Magistrate was not in any manner manifestly absurd, unjust or foolish, nor can it be said that the Magistrate ignored any principles which were necessary to apply under sections 202 and 203 of the Criminal Procedure Code nor is the order contrary to what was said in *Ramgopal Ganpatrai Ruia v. State of Bombay*³. That was a case in which the rule in regard to commitment proceedings and the power of the Committing Magistrate to commit was discussed and the expression "sufficient grounds," in sections 209, 210 and 213 of the Code of Criminal Procedure was interpreted. That was not a case dealing with the powers of the Magistrate under sections 202 and 203 which was specifically raised and decided in *Vadilal Panchal's case*². In *Ramgopal Ganpatrai Ruia's case*³, the following observations of Sinha, J. (as he then was), in regard to the expression "sufficient grounds" are pertinent :

"The controversy has centred round interpretation of the words 'sufficient grounds', occurring in the relevant sections of the Code, set out above. In the earliest case of *Lachman v. Juala*⁴, decided by Mr. Justice Mahmood in the Allahabad High Court, governed by section 195 of the Criminal Procedure Code of 1872 (X of 1872), the eminent judge took the view that the expression 'sufficient grounds' has to be understood in a wide sense including the power of the magistrate to weigh evidence. In that view of the matter, he ruled that if in the opinion of the magistrate, the evidence against the accused 'cannot possibly justify a conviction' there was nothing in the Code to prevent the magistrate from discharging the accused even though the evidence consisted of statement of witnesses who claimed to be eye-witnesses, but whom the magistrate entirely discredited. He also held that the High Court could interfere only if it came to the conclusion that the magistrate had committed a material error in discharging the accused or had illegally or improperly underrated the value of the evidence. Thus, he overruled the contention raised on behalf of the prosecution that the powers of the Committing Magistrate did not extend to weighing the evidence and that the expression 'sufficient grounds' did not

1. A.I.R. 1927 Lah. 30.

2. (1961) 2 S.C.J. 39 : (1961) 2 M.L.J. 217 : (1958) S.C.R. 618, 634.
(S.C.) 16 : (1961) 2 An.W.R. (S.C.) 16 : (1961) M.L.J. (Crl.) 389 : (1961) 1 S.C.R. 1, 9, 10.

3. (1958) S.C.J. 266 : (1958) M.L.J. (Crl.)

4. (1882) I.L.R. 5 All. 161.

include the power of discrediting eye-witnesses. Though the Code of Criminal Procedure was several times substantially amended after the date of that decision, the basic words 'sufficient grounds' have continued throughout. That decision was approved by a Division Bench of the Bombay High Court in *re Bai Parvati*¹, and the observations aforesaid in the Allahabad decision were held to be an accurate statement of the law as contained in section 209 of the Code, as it now stands. The High Court of Bombay held in that case that where the evidence tendered for the prosecution is totally unworthy of credit, it is the duty of the magistrate to discharge the accused. It also added that where the magistrate entertains any doubt as to the weight or quality of the evidence, he should commit the case to the Court of Session which is the proper authority to resolve that doubt and to assess the value of that evidence."

Debabrata Mookerjee, J., in the revision against the order of the previous Chief Presidency Magistrate accepted the finding of that Magistrate in regard to the delay. The present complaint out of which this appeal has arisen was filed after the appeal in this Court arising out of this complaint was withdrawn by Pramode Ranjan Sarkar. Can it be said that this is not an abuse of the process of the Court—one brother who was a Director of the Company and who would be interested in the Managing Directorship of the Company and the resolutions passed in regard to that office, brought a complaint in 1954 which was dismissed both by the Magistrate and the High Court. Appeal against the order of dismissal brought in this Court was withdrawn on 12th March, 1959. It was alleged in his complaint by Pramode Ranjan Sarkar that the present respondent was colluding with appellant, P.N. Taluqdar, who had offered him some kind of monetary inducement and that fact was deposed to by the present respondent himself as a witness in the previous complaint. He waited all this time although he knew about the forged signatures of his late brother on various documents and after at least the lapse of five years he brought a fresh complaint on the same facts. Neither he has disclosed as to when he came to know about the City Exchange nor have Santi Ranjan Sarkar and Pramode Ranjan Sarkar, which cannot therefore be said to be a fact which could not with reasonable diligence be adduced at the time of the previous complaint. The argument that this Court gave Special Leave in the case of Pramode Ranjan Sarkar and therefore there were points of importance is, in the circumstances of this case, a neutral circumstance and that fact cannot be used as a point in favour of the respondent.

In these circumstances, we are of the opinion that the bringing of the fresh complaint is a gross abuse of the process of the Court and is not with the object of furthering the interests of justice.

In regard to the power of reference to a larger Bench, we are in agreement with S. K. Das, J., and in the circumstances it is unnecessary to express an opinion as to the applicability of section 196-A, Criminal Procedure Code, to the facts of this case.

For these reasons we allow the appeals, set aside the order of the High Court and of the learned Chief Presidency Magistrate and dismiss the complaint.

ORDER OF THE COURT.—In accordance with the judgment of the majority, the appeals are allowed.

K.L.B.

Appeals allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. N. WANCHOO,
J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

M/s. West Ramnad Electric Distribution Co., Ltd.

.. Appellant*

v.

The State of Madras and another

.. Respondents.

1. Madras State Electricity Board }

.. Interveners.

2. The State of Andhra Pradesh }

Madras Electricity Supply Undertakings (Acquisition) Act (XXIX of 1954), section 24—Scope—Retrospective validation of action taken under void earlier Madras Act (XLIII of 1949)—Vires—Section 5—Validity—Constitution of India, 1950, Article 31 (1) and (2)—Compliance with—Criteria.

In construing section 24 of Madras Act (XXIX of 1954) we have to bear in mind the fact that the Act is retrospective in operation and is intended to bring within the scope of its material provisions undertakings of which possession had already been taken. Section 24 is a saving and validating provision and it clearly intends to validate actions taken under the relevant provisions of the earlier Act (Madras Act XLIII of 1949) which was invalid from the start. The fact that section 24 does not use the usual phraseology that the notifications issued under the earlier Act (acquiring an Electricity Supply Undertaking) shall be deemed to have been issued under the validating Act does not alter the position that the second part of the section has and is intended to have the same effect. In considering whether Article 31 (1) of the Constitution has been complied with or not, we must assume that before the notification was issued the relevant provisions of the validating Act were in existence and so Article 31 (1) must be held to have been complied with in that sense. It cannot be said that the Legislature cannot pass a law retrospectively validating actions taken under a law which was void because it contravened fundamental rights.

When a party challenges the validity of a statutory provision like section 5 of Madras Act (XXIX of 1954), it is necessary that the party must adduce satisfactory and sufficient material before the Court on which it wants the Court to hold that the compensation which would be paid under every one of the three bases under the impugned statutory provision does not amount to a just equivalent. Looking merely at the scheme of the section itself it is impossible to arrive at such a conclusion.

Appeals from the Judgment and Order dated 27th March, 1956 of the Madras High Court in Writ Petitions Nos. 326 of 1955 and 107 of 1956.

M. K. Nambiar, Senior Advocate (P. Ram Reddy, Advocate, with him) for Appellant.

R. Ganapathy Iyer and P. D. Menon, Advocates, for Respondents.

R. Gopalakrishnan, Advocate, for Intervener No. 1.

K. Bhimasankaram, Senior Advocate (B. R. G. K. Achar and P. D. Menon Advocates, with him), for Intervener No. 2.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The principal question which arises in these two appeals is related to the validity of section 24 of the Madras Electricity Supply Undertakings (Acquisition) Act, 1954 (XXIX of 1954) (hereinafter called the Act). That question arises in this way. The appellant, the West Ramnad Electric Distribution Co., Ltd., Rajapalayam, was incorporated in 1935 to carry on, within the State of Madras and elsewhere, the business of an electric light and power company, to construct, lay down and establish and carry on all necessary installations, to generate, accumulate, distribute and supply electricity under a licence granted under the Indian Electricity Act of 1910. On the 24th January, 1950, the Madras Legislature passed an Act (XLIII of 1949) for the acquisition of undertakings supplying electricity in the Province of Madras. Under the said Act, the Government was empowered to acquire any electrical undertaking on payment of compensation according to the relevant provisions of the said Act. In pursuance of the provisions of section 4 (1) of the said Act, the respondent, State of Madras, passed an Order G.O. Ms. No. 2059 on the 17th May, 1951, declaring that the appellant undertaking shall vest in the respondent from the 21st September, 1951. Thereafter, the respondent appointed the Chief Electrical Inspector as the Ac-

quisition Officer, and on the appointed day, the said Officer took over possession of the appellant and all its assets, records and account-books. The appellant then appointed the liquidator as its accredited representative for the purposes of the Act in order to claim compensation under the Act. The respondent then paid over to the appellant Rs. 6 lakhs on the 24th October, 1952 and Rs. 2,34,387-1-0 on the 5th July, 1953 as compensation. According to the appellant Rs. 98,876-15-0 still remained to be paid to it by way of compensation under the Act, whereas the respondent suggested that only Rs. 6,000 was the balance due to the appellant. That is how the appellant undertaking went into possession of the respondent and the appellant was paid partial compensation.

It appears that owners of some of the electrical undertakings in Madras which had been taken over by the respondent in accordance with the provisions of section 4 (1) of the 1949 Act filed Writ Petitions in the High Court of Madras impugning the validity of the said Act. These Writ Petitions however failed and by its judgment in *Narasaraopeta Electric Corporation, Ltd. v. State of Madras*¹ the Madras High Court upheld the validity of the impugned Act in so far as it related to the licensees other than municipalities. The said licensees then moved this Court and their appeal succeeded. By its decision in the *Rajamundry Electric Supply Corporation, Ltd. v. The State of Andhra*² this Court held that the impugned Act of 1949 was *ultra vires*. This decision was based on the ground that the Act was beyond the legislative competence of the Madras Legislature inasmuch as there was no entry in any of the three Lists of the Seventh Schedule of the Government of India Act, 1935 relating to compulsory acquisition of any commercial or industrial undertaking. This Court observed that although section 299 (2) of the said Constitution Act contemplated a law authorising compulsory acquisition for public purposes of a commercial or industrial undertaking, a corresponding entry had not been included in any of the three Lists and so, the Madras Legislature was not competent to pass the impugned Act. This decision was pronounced on the 10th February, 1954.

Meanwhile the Constitution came into force on the 26th January, 1950, and the position of the legislative competence of the Madras Legislature in respect of the compulsory acquisition of commercial or industrial undertakings for public purposes has been materially altered. Entry 36 in List II of the Seventh Schedule to the Constitution refers to acquisition or requisitioning of property, except for the purposes of the Union subject to the provisions of Entry 42 of List III whereas Entry 42 of List III deals with the principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given. That is how the two entries read at the relevant time.

After the decision of this Court was pronounced in the *Case of Rajamundry Electric Supply Corporation, Ltd.*² the Madras Legislature passed the Act and it received the assent of the President on the 9th October, 1954, and was published in the Government Gazette on the 13th October, 1954. The Act incorporated the main provisions of the earlier Act of 1949 and purported to validate action taken under the said earlier Act. After the Act was passed the respondent issued a new Government Order No. 4388 on the 14th December, 1954, appointed the Chief Electrical Inspector to be the Acquisition Officer of the appellant concern for purposes of the Act. As a result of this order the appellant undertaking which had been taken over by the respondent on the 21st September, 1951, continued to be in the possession of the respondent. It is under these circumstances that the appellant filed its Writ Petition No. 326 of 1955 on the 26th April, 1955.

In its Writ Petition, the appellant alleged that to the extent to which the Act purports to validate acts done under the earlier Act of 1949 it is *ultra vires* ineffectual and inoperative. It was further urged that the three bases of compensation as laid down by the Act are inconsistent with the requirements of Article 31 of the

1. (1951) 2 M.L.J. 277.

2. (1954) S.C.J. 310 : (1954) 1 M.L.J. 493 :

Constitution and so, the operative provisions of the Act are unconstitutional. On these grounds the appellant prayed for a writ of *certiorari* or any other appropriate writ, or order, or direction calling for the records relating to G.O. Ms. No. 2059, issued on the 17th May, 1951, and quashing the same. Later the appellant filed another Writ Petition No. 107 of 1956 on the 31st January, 1956, and it added a prayer that a writ of *mandamus* or any other writ, or order or direction should be issued directing the respondent to restore possession of the appellant undertaking with all its assets along with mesne profits from 21st September, 1951, or pay the market value of the said undertaking as on 21st September, 1951, and interest thereon at 6 per cent per annum and to direct payment of costs and pass such other orders as may be appropriate and just in the circumstances of the case.

The claim thus made by the appellant was denied by the respondent. The respondent's case was that the Act is valid and section 24 which operates retrospectively has validly and effectively validated actions taken under the earlier Act, with the result that the possession of the appellant undertaking which was taken on the 21st September 1951, must be deemed to have been taken under the provisions of the Act and so the claim made by the appellant either for a writ of *certiorari* or *mandamus* could not be granted. It was also urged that it would not be open to the appellant to claim possession of the undertaking or to ask for mesne profits in writ proceedings.

Mr. Justice Rajagopalan who heard the two Writ Petitions rejected the contentions raised by the appellant and dismissed the said petitions. He held that having regard to the fact that the appellant had accepted compensation under the earlier Act, no real relief could be granted to it even if its contention that section 24 of the Act was invalid is upheld. In other words, the learned Judge took the view that even if the challenge made by the appellant to the validity of section 24 was found to be justified, in the present writ proceedings he would not be prepared to grant it the relief either of possession or of mesne profits. Even so the learned Judge proceeded to examine the several points urged by the appellant in support of its contention that section 24 was invalid, and rejected them. In his opinion, the Act was valid and section 24 being retrospective in operation validated the actions taken by the respondent under the earlier Act. The argument that the compensation awardable under the Act was inconsistent with Articles 31 (1) and 31 (2) was not accepted, *inter alia* on the ground that no material had been placed before the Court on which the appellant's plea could be sustained. The learned Judge has also recorded his conclusions on some other points urged before him but it is unnecessary to refer to them. After this decision was pronounced the appellant moved the learned Judge for a certificate under Article 132 (1) of the Constitution and it is with the certificate thus granted to it under the said Article that the present appeals have been brought to this Court.

The first point which Mr. Nambiar has raised before us on behalf of the appellant is that section 24 which purports to validate action taken under the earlier Act is in law ineffective to sustain the order issued by the respondent on the 17th May, 1951. It would be recalled that by this order the respondent obtained possession of the appellant undertaking for the first time under the relevant provisions of the earlier Act. The argument is that there is no specific or express provision in the Act which makes the Act retrospective and so section 24 even if it is valid is ineffective for the purpose of sustaining the impugned order by which possession of the appellant concern was obtained by the respondent. The impugned order had recited that the appellant concern shall vest in the Government on the 21st September, 1951, and it directed that under section 4 (2) of the earlier Act the said order shall be published in the Gazette. Under the said order, a further direction had been issued appointing the Chief Electrical Inspector to the respondent to be the Acquisition Officer, and the appellant was requested to take action for the appointment of an accredited representative in accordance with section 8 of the earlier Act and to submit the inventories and all particulars required under section 17 of the said Act. Mr. Nambiar contends that this order amounts to a notification which must be

held to be a law under Article 13 of the Constitution. For the purpose of the present appeals, we will assume that the said order is a notification and amounts to a law under Article 13. Mr. Nambiar further contends that this notification was invalid for two reasons ; it was invalid because it had been issued under the provisions of an Act which was void as being beyond the legislative competence of the Madras Legislature, and it was void for the additional reason that before it was issued, the Constitution of India had come into force and it offended against the provisions of Article 31 of the Constitution, and so, Article 13 (2) applied. Section 24 of the Act, no doubt, purported or attempted to validate this notification, but the said attempt has failed because the Act being prospective, section 24 cannot have retrospective operation. That, in substance, is the first contention raised before us.

Before dealing with this argument it would be necessary to examine the broad features of the Act and understand its general scheme. The Act was passed because the Madras Legislature thought it expedient to provide for the acquisition of undertakings other than those belonging to and under the control of the State Electricity Board constituted under section 5 of the Electricity (Supply) Act, 1948 in the State of Madras engaged in the business of supplying electricity to the public. It is with that object that appropriate provisions have been made by the Act to provide for the acquisition of undertakings and to lay down the principles for paying compensation for them. It is quite clear that the scheme of the Act was to bring within the purview of its material provisions undertakings in respect of which no action had been taken under the earlier Act and those in respect of which action had been so taken. In fact as we will presently point out, several provisions made by the Act clearly referred to both types of undertakings and leave no room for doubt that both types of undertakings are intended to be governed by it. The definition of an 'accredited representative' prescribed by section 2 (b) shows that the accredited representative means the representative appointed or deemed to have been appointed under section 7. Similarly, section 2 (j) which defines a licensee provides that in relation to an undertaking taken over or an undertaking which has vested in the Government under section 4, it shall be the person who was the licensee at the time when the undertaking was taken over or vested in the Government, as the case may be, or his successor-in-interest. Section 2 (l) defines an undertaking taken over as meaning an undertaking taken over by the Government after the 1st January, 1951, and before the commencement of this Act. The 'vesting date' under section 2 (m) means in relation to an undertaking, the date fixed under section 4 (i) as the date on which the undertaking shall vest in the Government or in the case of an undertaking taken over, the date on which it was taken over. These definitions thus clearly point out that the Act was intended to apply to undertakings of which possession would be taken after the Act was passed as well as undertakings of which possession had already been taken under the relevant provisions of the earlier Act.

Section 3 which deals with the application of the Act, provides that it shall apply to all undertakings of licensees including: (a) undertakings in respect of which notice for compulsory purchase has been served under section 7 of the Electricity Act, such undertakings not having been taken over before the commencement of this Act; and (b) undertakings taken over. Similarly, section 4 which gives power to the respondent to take over any undertaking which had already not been taken over, be exercised in respect of any undertaking which had already not been taken over. In dealing with the appointment of sole representative, section 7, sub-sections (3) and (5) bring out the same distinction between undertakings already taken over and those which had yet to be taken over. The same distinction is equally clearly brought out in section 10 (3), section 11 sub-sections (2), (5) and (11), and section 14 (3). It is thus clear that the Act in terms, is intended to apply to undertakings of which possession had already been taken, and that obviously means that its material and operative provisions are retrospective. Actions taken under the provisions of the earlier Act are deemed to have been taken under the provisions of the Act and possession taken under the said earlier provisions is deemed to have been taken under the relevant provisions of the Act. This retrospective operation

of the material provisions of the Act is thus writ large in all the relevant provisions and is an essential part of the scheme of the Act. Therefore, Mr. Nambiar is not right when he assumes that the rest of the Act is intended to be prospective and so, section 24 should be construed in the light of the said prospective character of the Act. On the contrary, in construing section 24, we have to bear in mind the fact that the Act is retrospective in operation and is intended to bring within the scope of its material provisions undertakings of which possession had already been taken.

Let us then construe section 24 and decide whether it serves to validate the impugned notification issued by the respondent on the 21st September, 1951. Section 24 reads thus :—

“Orders made, decisions or directions given, notifications issued, proceedings taken and acts or things done, in relation to any undertaking taken over, if they would have been validly made, given, issued, taken or done, had the Madras Electricity Supply Undertakings (Acquisition) Act, 1949 (Madras Act XLIII of 1949), and the rules made thereunder been in force on the date on which the said orders, decisions or directions, notifications, proceedings, acts or things, were made, given, issued, taken or done are hereby declared to have been validly made, given, issued, taken or done, as the case may be except to the extent to which the said orders, decisions, directions, notifications, proceedings, acts or things are repugnant to the provisions of this Act.”

The first part of the section deals, *inter alia*, with notifications which have been validly issued under the relevant provisions of the earlier Act and it means that if the earlier Act had been valid at the relevant time, it ought to appear that the notifications in question could have been and had in fact been made properly under the said Act. In other words before any notification can claim the benefit of section 24, it must be shown that it was issued properly under the relevant provisions of the earlier Act assuming that the said provisions were themselves valid and in force at that time. The second part of the section provides that the notifications covered by the first part are declared by this Act to have been validly issued; the expression “hereby declared” clearly means “declared by this Act” and that shows that the notifications covered by the first part would be treated as issued under the relevant provisions of the Act and would be treated as validly issued under the said provisions. The third part of the section provides that the statutory declaration about the validity of the issue of the notification would be subject to this exception that the said notification should not be inconsistent with or repugnant to the provisions of the Act. In other words, the effect of this section is that if a notification had been issued properly under the provisions of the earlier Act and its validity could not have been impeached if the said provisions were themselves valid, it would be deemed to have been validly issued under the provisions of the Act, provided, of course, it is not inconsistent with the other provisions of the Act. The section is not very happily worded, but on its fair and reasonable construction, there can be no doubt about its meaning or effect. It is a saving and validating provision and it clearly intends to validate actions taken under the relevant provisions of the earlier Act which was invalid from the start. The fact that section 24 does not use the usual phraseology that the notifications issued under the earlier Act shall be deemed to have been issued under the Act, does not alter the position that the second part of the section has and is intended to have the same effect.

No doubt, Mr. Nambiar suggested that section 24 does not seem to validate actions taken under the earlier Act on the basis that the earlier Act was void and *non est* and in support of this argument, he relies on the fact that the notifications falling under the first part of section 24 are referred to as validly made and the earlier Act and the rules made thereunder are assumed to have been in force on the date on which the said notification was issued. He also relies on the provisions of section 25 which purports to repeal the said Act and that, no doubt, gives room for the argument that the Legislature did not recognise that the said Act was *non est* and dead right up from the start. It is not easy to understand the genesis of section 25 and the purpose which it is intended to achieve. The only explanation given by Mr. Ganapati Aiyer on behalf of the respondent is that since the earlier Act was in fact on the statute book, the Legislature may have thought that for the sake of form, it may have to be repealed formally and so, section 25 was enacted. But

even if the enactment of the said section be held to be superfluous or unnecessary, that cannot assist the appellant in the construction of section 24. We have no doubt that section 24 was intended to validate actions taken under the earlier Act and on its fair and reasonable construction, it must be held that the intention has been carried out by the Legislature by enacting the said section. Therefore, the argument that section 24, even if valid, cannot effectively validate the impugned notification, cannot succeed.

Mr. Nambiar then contends that the impugned notification is invalid and in-operative because it contravenes Article 31 (1) of the Constitution. Article 31 (1) provides that no person shall be deprived of his property save by authority of law. It is urged that this provision postulates the existence of an antecedent law before a citizen is deprived of his property. The notification was issued on the assumption that there was an antecedent law, viz., the earlier Act of 1949; but since the said Act was *non est*, the notification is not supported by the authority of any pre-existing law and so, it must be held to be invalid and ineffective. In our opinion, this argument is not well-founded. If the Act is retrospective in operation and section 24 has been enacted for the purpose of retrospectively validating actions taken under the provisions of the earlier Act, it must follow by the very retrospective operation of the relevant provisions that at the time when the impugned notification was issued, these provisions were in existence. That is the plain and obvious effect of the retrospective operation of the statute. Therefore, in considering whether Article 31 (1) has been complied with or not, we must assume that before the notification was issued, the relevant provisions of the Act were in existence and so, Article 31 (1) must be held to have been complied with in that sense.

In this connection, it would be relevant to refer to the provisions of Article 20 (1), because the said provisions illustrate the point that where the Constitution desired to prevent the retrospective operation of any law, it has adopted suitable phraseology to carry out that object. Article 20 (1) provides that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. By using the expression "law in force" in both the parts of Article 20 (1), the Constitution has clearly indicated that even if a criminal law was enacted by any Legislature retrospectively, its retrospective operation would be controlled by Article 20 (1). A law in force at the time postulates actual factual existence of the law at the relevant time and that excludes the retrospective application of any subsequent law. Article 31 (1), on the other hand, does not use the expression "law in force at the time;" it merely says "by authority of law", and so, if a subsequent law passed by the Legislature is retrospective in its operation, it would satisfy the requirement of Article 31 (1) and would validate the impugned notification in the present case. Therefore, we are not satisfied that Mr. Nambiar is right in contending that the impugned notification is invalid for the reason that at the time when it was issued there was no law by whose authority it could be sustained.

That takes us to the larger issue raised by Mr. Nambiar in the present appeals. He contends that the power of the Legislature to make laws retrospective cannot validly be exercised so as to cure the contravention of fundamental rights retrospectively. His contention is that the earlier Act of 1949 being dead and non-existent, the impugned notification contravened Article 31 (1) and this contravention of a fundamental right cannot be cured by the Legislature by passing a subsequent law and making it retrospective. In support of this argument, he has relied on the decision of this Court in *Deep Chand v. The State of Uttar Pradesh and others*¹. In that case, one of the questions which arose for decision was whether the doctrine of eclipse applied to a law which was found to be invalid for the reason that it contravened the fundamental rights, and the majority decision held that it did not

apply to such a law. In dealing with the question as to the applicability of the doctrine of eclipse, a distinction was drawn between a law which was void either for want of legislative power at the time when it was passed, or because it contravened fundamental rights on the one hand, and the law which was valid when it was passed but subsequently became invalid because of supervening circumstances on the other. In the latter case, the law was valid when it was passed and became invalid because a cloud was cast on its validity by supervening circumstances. That being so, if the constitutional amendment subsequently made removes the cloud, the validity of the law is revived. That is the effect of application of the doctrine of eclipse; but there can be no scope for the application of the said doctrine to a law which is void and *non est* either for want of legislative competence or because it contravenes fundamental rights. That, in substance, is the effect of the majority decision in *Deep Chand's case*¹. In the present appeals it is not disputed that the earlier Act of 1949 was dead and void from the start, and that no doubt, is consistent with the majority decision in *Deep Chand's case*¹. But the question as to whether the Legislature can retrospectively validate actions taken under a void law did not arise for consideration in *Deep Chand's case*¹. The only point which was decided was that the removal of the cloud by a subsequent constitutional amendment will not automatically revive a law which was void from the start, but that obviously is not the case before us. What we are called upon to decide in the present appeals is whether or not it is competent to the Legislature to pass a law retrospectively to validate actions taken under a void Act, and in deciding this question, *Deep Chand's case*¹, would not afford us any assistance.

Mr. Nambiar did not dispute the position that in enacting laws in respect of topics covered by appropriate entries in the relevant Lists of the 7th Schedule to the Constitution, the Legislatures would be competent to make the provisions of the laws passed by them retrospective. He, however, seeks to import a limitation on this legislative power where the contravention of fundamental rights is involved. No authority has been cited in support of the plea that the legislative power of the Legislature is subject to any such limitation even where the contravention of fundamental rights is involved. On principle, it is difficult to appreciate how such a limitation on the legislative power can be effectively pleaded. If a law is invalid for the reason that it has been passed by a Legislature without legislative competence, and action is taken under its provisions, the said action can be validated by a subsequent law passed by the same Legislature after it is clothed with the necessary legislative power. This position is not disputed. If the Legislature can by retrospective legislation cure the invalidity in actions taken in pursuance of laws which were void for want of legislative competence and can validate such actions by appropriate provisions, it is difficult to see why the same power cannot be equally effectively exercised by the Legislature in validating actions taken under laws which are void for the reason that they contravened fundamental rights. As has been pointed out by the majority decision in *Deep Chand's case*¹ the infirmity proceeding from lack of legislative competence as well as the infirmity proceeding from the contravention of fundamental rights lead to the same result and that is that the offending legislation is void and *non est*. That being so if the Legislature can validate actions taken under one class of void legislation, there is no reason why it cannot exercise its legislative power to validate actions taken under the other class of void legislation. We, are, therefore not prepared to accept Mr. Nambiar's contention that where the contravention of fundamental rights is concerned the Legislature cannot pass a law retrospectively validating actions taken under a law which was void because it contravened fundamental rights.

In this connection it may be useful to refer to some decisions which deal with the Legislature's powers to pass retrospective law. In *The United Provinces v. Mst. Aliqa Begum and others*² Gwyer, C.J., observed that :

1. (1959) S.C.J. 1059 : (1959) Suppl. (2) S.C.R. 8.

2. (1940) F.L.J. 97 : (1941) 1 M.L.J. (Supp.) 65 : (1940) F.C.R. 110 at p. 155.

"the validation of doubtful executive acts is not so unusual or extraordinary a thing that little surprise would be felt if Parliament had overlooked it, and it would take a great deal to persuade me that the legislative power for the purpose has been denied to every Legislature, including the Central or Federal Legislature, in India". "It is true" he added "that validation of executive orders or any entry even remotely analogous to it is not to be found in any of the three Lists; but I am clear that legislation for that purpose must necessarily be regarded as subsidiary or ancillary to the power of legislation on the particular subject in respect of which the executive orders may have been issued."

The same principle was stated by Spens, C.J., in *Piare Dusadh and others v. The King Emperor*¹.

This question has been considered by this Court in several decisions to some of which we will now briefly refer. In *The Union of India v. Madan Gopal Kabra*² this Court had occasion to consider the validity of certain amendments made in the Income-tax Act by section 3 of the Finance Act (XXV of 1950). These amendments had the effect of applying retrospectively the charging sections of the Taxing Act and their validity was impeached. In rejecting the argument that the levy authorised to be imposed by the amendments was *ultra vires*, Patanjali Sastri, C.J., observed that :

"while it is true that the Constitution has no retrospective operation, except where a different intention clearly appears, it is not correct to say that in bringing into existence new Legislatures and conferring on them certain powers of legislation, the Constitution operated retrospectively. The legislative powers conferred upon Parliament under Articles 245 and 246 read with List I of the Seventh Schedule could obviously be exercised only after the Constitution came into force and no retrospective operation of the Constitution is involved in the conferment of those powers. But it is a different thing to say that Parliament in exercising the powers thus acquired is precluded from making a retrospective law."

And so, the conclusion was that Parliament was competent to make a law imposing a tax on the income of any year prior to the commencement of the Constitution.

In *M.P.V. Sundararamier & Co. v. The State of Andhra Pradesh and another*³ the validity of the Sales Tax Laws Validation Act 1956 (VII of 1956) was questioned and the majority of the Court held that the said Act was in substance one lifting the ban on taxation of inter-State sales and within the authority conferred on the Parliament under Article 286 (2) and further that under that provision it was competent to the Parliament to enact a law with retrospective operation. This conclusion also proceeded on the basis that the power of a Legislature to pass a law included a power to pass it retrospectively, and so, the argument that the impugned Act was bad on the ground that it was retrospective in operation was rejected. The same principle has been again enunciated by this Court in *M/s. J.K. Jute Mills Co. Ltd. v. State of Uttar Pradesh and another*⁴. It has been held in this case that the power of the Legislature to enact a law with reference to a topic entrusted to it is unqualified, subject only to any limitation imposed by the Constitution in the exercise of such a power, and that it would be competent for the Legislature to enact a law which is either prospective or retrospective, vide also *Mt. Jadao Bahuji v. The Municipal Committee, Khandwa and another*⁵, *Jadab Singh and others v. The Himachal Pradesh Administration and another*⁶ and *M/s. Raghubar Dayal Jai Prakash and others v. The Union of India and another*⁷. Therefore, there is no doubt about the competence of the Legislature to enact a law and make it retrospective in operation in regard to topics included within the relevant Schedules of the Constitution. Our conclusion, therefore, is that the appellant's contention that it was beyond the competence

1. (1943) F.L.J. 187 : (1944) 1 M.L.J. 305 :

(1944) F.C.R. 61 at p. 103.

2. (1954) S.C.J. 110 : (1954) S.C.R. 541 at p. 554.

3. (1958) S.C.J. 459 : (1958) 1 M.L.J. (S.C.) 179 : (1958) 1 An.W.R. (S.C.) 179 : (1958) S.C.

R. 1422.

4. A.I.R. 1961 S.C. 1534.

5. A.I.R. 1951 S.C. 1486.

6. (1961) 1 S.C.J. 185 : (1960) 3 S.C.R. 755.

7. (1962) 2 S.C.J. 445 : A.I.R. 1962 S.C. 263.

of the Madras Legislature to make the Act retrospective so as to validate the impugned notification, cannot be accepted.

That takes us to the last argument raised by Mr. Nambiar before us. He contends that section 5 of the Act which provides for the payment of compensation to the licensees whose undertakings are taken over, is invalid because it is inconsistent with Article 31 (2). It is common ground that the provisions of Article 31 (2) with which we are concerned in the present appeals are those as they stood before the Fourth Constitutional Amendment came into force. Article 31 (2) then provided, *inter alia*, that no property shall be compulsorily acquired save for the public purpose and save by authority of law which, provides for compensation for the property so acquired and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given. In support of his argument, Mr. Nambiar has relied on the decision of this Court in *The State of West Bengal v. Mrs. Bala Banerjee and others*¹. In dealing with the question about the scope and effect of the provisions of Article 31 (2) in so far as they referred to the payment of compensation, this Court observed that though Entry 42 of List III conferred on the Legislature the discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner of the property acquired, Article 31 (2) required that such principles must ensure that what is determined as payable must be 'compensation' that is, a just equivalent of what the owner has been deprived of. That is why in considering the validity of any statute in the light of Article 31 (2) it would be open to the Court to enquire whether all the elements which make up the true value of the property acquired have been taken into account in laying down the principles for determining compensation. It appears that section 8 of the West Bengal Land Development and Planning Act, 1948 (XXI of 1948) which was impugned in that case limited the amount of compensation so as to not to exceed the market value of the land on 31st December, 1946, no matter when the land was acquired. This part of section 8 was struck down as invalid because it was held that in fixing the market value on 31st December, 1946, as the ceiling on compensation, the Legislature had patently ignored the fact that prices of lands had considerably risen after the said date and that tended to show that the compensation awardable under the said provision could not be said to be just equivalent of what the owner would be deprived of. Mr. Nambiar, therefore, contends that since section 5 does not authorise the payment of compensation which can be treated as just equivalent of the property which would be taken over under its provisions, it must be struck down as inconsistent with Article 31 (2). It may be conceded that the Fourth Constitution amendment which substantially changed the provisions of Article 31 (2) would be inapplicable in the present case, and that the High Court was in error in making a contrary assumption.

In support of this argument, Mr. Nambiar had also referred us to section 7-A of the Indian Electricity Act, 1910 (IX of 1910) as it then stood. Section 7-A (2) of the said Act lays down that in purchasing undertakings under section 7-A (1), the value of such lands, buildings, works, materials, and plant shall be deemed to be their market value at the time of purchase, due regard being had to the nature and condition for the time being of such lands, buildings, materials and plant and the state of repair thereof and to the circumstance that they are in such position as to be ready for immediate working and to the suitability of the same for the purpose of the undertaking. The proviso to section 7-A lays down that to the value determined under sub-section (2) shall be added such percentage, if any, not exceeding twenty per centum of that value as may be specified in the licence on account of compulsory purchase. Mr. Nambiar suggests that the provisions made in section 7-A (2) and the proviso to section 7-A of this Act give a fair picture of what could be

regarded as a reasonable compensation that should be paid to the undertakings before they are acquired.

Before dealing with this argument, it is necessary to examine the scheme of section 5 which provides for the compensation to be paid to the licensees. Section 5 provides that the compensation payable to a licensee on whom an order has been served under section 4 or whose undertaking has been taken over before the commencement of the Act, shall be determined under any one of the Bases A, B and C specified by the section, as may be chosen under section 8. Then follow detailed provisions about the three Bases A, B and C. Under Basis A, the compensation payable shall be an amount equal to twenty times the average net annual profit of the undertaking during a period of five consecutive account years immediately preceding the vesting date. The *Explanation* makes it clear that the new annual profit shall be determined in the manner laid down in Part A or Part B, as the case may be, of Schedule I. It is also clear that this basis shall not apply to an undertaking which has not been supplying electricity for five consecutive account years immediately preceding the vesting date.

Under Basis B, the compensation payable shall be the aggregate value of all the shares constituting the share capital of the undertaking, reckoned as indicated in clauses (a) (b), (c) and (d), thereof. These respective clauses have reference to the dates on or before which the shares of the undertaking have been issued, for instance, clause (a) provides that in the case of shares issued on or before the 31st March, 1946, the value of each share shall be reckoned at its average value as arrived at from the quotations for the shares as given in the official list of the Madras Share Market on the 15th day of each month and where such market was closed on that day, the quotations on the next working day, during the period of three years commencing on the 1st April, 1946, and ending on the 31st March, 1949. Under clause (b) it is provided that in the case of shares issued on or before the 31st March, 1946, if clause (a) does not apply but there have been *bona fide* transfers in each of the different classes of shares in every one of the three years aforesaid, and such transfers have been duly registered in the appropriate books of the licensee, the value of each share of each such class shall be reckoned at one-third of the aggregate of its three annual average values for the three years, the average value for each year being determined from the transactions in that year. It is not necessary to set out clauses (c) and (d). The *Explanation* to this Basis provides that it shall not apply unless clause (a) or clause (b) is applicable.

Under Basis C, the compensation payable shall be the aggregate value of the amounts specified in clauses (i) to (viii). These clauses refer respectively to the book value of all completed works in beneficial use pertaining to the undertaking and handed over to the Government less depreciation as specified; the book value of all works in progress; the book value of all stores; the book value of all other fixed assets; the book value of all plant and equipment; the book value of all intangible assets to the extent such value has not been written off in the books of the licensee; the amount due from consumers as specified in clause (vii); and any amount paid actually by the licensee in respect of every contract referred to in section 6 (2) (a) (iii). Where Basis C is applied, an additional sum by way of solatium is required to be paid as specified in clauses (a) and (b) to clause (ix). The *Explanation* to Basis C explains how the book value of any fixed asset has to be ascertained. That, in broad outlines, is the nature of the three Bases prescribed by section 5 for assessing the compensation to be paid to a licensee.

It is true that in none of the three bases does the Legislature refer to the market value of the undertaking, but that itself cannot justify the argument that what is intended to be paid by way of compensation must necessarily mean much less than the market value. The failure of the Legislature to refer to the fair market value cannot, in our opinion, be regarded as conclusive or even presumptive evidence of the fact that what is intended to be paid under section 5 does not amount to a just

equivalent of the undertaking taken over. After all, in considering the question as to whether compensation payable under one or the other of the Bases amounts to just equivalent, we must try to assess what would be payable under the said basis.

On this point, the real difficulty in the way of the appellant is that it has produced no material before the Court on which its plea can be sustained. As the High Court has pointed out, in the absence of any satisfactory material it would be difficult for the Court to come to any definite conclusion on the question as to whether just equivalent is provided for by section 5 or not. Mr. Nambiar, no doubt, attempted to suggest that in the Madras High Court oral evidence is not allowed to be adduced on questions of fact in writ proceedings. That may be so ; but it is quite clear that the affidavit made by the appellant in support of its petition could have easily set forth all relevant facts showing that the compensation payable under section 5 was so inadequate that it could not be regarded as a just equivalent of the property acquired. In the absence of any material we do not see how we can assess the validity of Mr. Nambiar's contention that section 5 contravenes Article 31 (2) of the Constitution. It is true that in its petition the appellant made a general allegation that the market value of its assets at the relevant time would be Rs. 16,49,350 but no satisfactory material was placed in the form of proper affidavits made by competent persons to show how this market value was determined. In fact, the appellant did not state before the High Court and was unable to state even before this Court, what principles should have been laid down by the Legislature in determining a just equivalent for the undertaking taken over by the respondent. The general argument that section 5 does not provide for the payment of market value cannot in the absence of material help the appellant at all in challenging the validity of section 5.

In this connection it must be borne in mind that section 8 of the Act leaves it to the option of the licensee to intimate to the Government in writing which basis of compensation it wants to be adopted and so it is not as if the choice of the basis is left to the Government in every case. Take for instance Basis A : the compensation payable under this Basis is an amount equal to twenty times the average net annual profit of the undertaking during a period of five consecutive account years preceding the vesting date. Now in determining the fairness or otherwise of the compensation awardable under Basis A, it cannot be ignored that what is acquired is an undertaking which is a going commercial concern and so it would *prima facie* be inappropriate to attempt to determine its value solely or mainly by reference to the buildings it owns or the machinery it works. It would also be relevant to remember that undertakings of this kind cannot claim a general market in the sense in which lands can claim it. That being so if the Legislature thought that giving the undertaking twenty times the average net annual profit would amount to a just equivalent, *prima facie* it would be difficult to hold that the basis adopted by the Legislature is such as could be held to be inconsistent with Article 31 (2). The Basis B may or may not be satisfactory, but Basis C may *prima facie* be satisfactory in respect of new undertakings and in any case the option in most cases would be with the undertaking itself. Therefore in the absence of any material we are unable to hold that on looking at the scheme adopted by section 5 itself, the appellants' argument that what is offered by way of compensation is not a just equivalent, can be accepted. It may be that in some cases Basis B may work hardship and conceivably even Basis A or Basis C may not be as satisfactory as it should be ; but when a party challenges the validity of a statutory provision like section 5 it is necessary that the party must adduce satisfactory and sufficient material before the Court on which it wants the Court to hold that the compensation which would be paid under everyone of the three Bases under the impugned statutory provision does not amount to a just equivalent. Looking merely at the scheme of the section itself it is impossible to arrive at such a conclusion. That is the view taken by the Madras High Court and we see no reason to differ from it. Therefore the challenge to the validity of the Act on the ground that its important provisions contained in

section 5 offend against Article 31 (2) must be rejected. That being our view we must hold that the High Court was right in rejecting both the Writ Petitions filed by the appellant. On that view it is unnecessary to consider whether the appellant would have been entitled to get the relief of possession or mesne profits which it purported to claim by its two petitions.

The appeals accordingly fail and are dismissed with costs. One set of hearing fees.

Appeals dismissed.

K. S.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J.L. KAPUR, A.K. SARKAR AND M. HIDAYATULLAH, JJ.

.. Appellant*

M.S. Anirudhan

v.

.. Respondent.

The Thomco's Bank, Ltd.

Surety—Letter of guarantee—Alteration of the liability by reducing the amount—Alteration by the principal debtor—If the surety is discharged—Deed—Alteration of—Right of parties under the deed—How affected.

The amount mentioned in the letter of guarantee executed by the surety was not accepted by the creditor who required the principal debtor to reduce the amount. The document was handed back to the principal debtor who altered the document by reducing the amount mentioned therein. The principal debtor was acting for and on behalf of the surety because it was at his instance that the surety was guaranteeing the payment and the surety had handed over the deed of guarantee to the principal debtor for the purposes of being given to the creditor. In these circumstances the avoidance of contract by material alteration is inapplicable because the document was not altered while in possession of the promisee or his agent but was altered by the principal debtor who was at the time acting as the agent of the guarantor. On the question of the guarantors liability under the letter of guarantee

Held, (by the majority Sarkar, J. holding contra).—Such an alteration must be regarded as unsubstantial and not otherwise than beneficial to the surety. The document cannot be said to have been materially altered because it has not been altered in such a manner as to change its nature.

If the alteration is to the disadvantage of the surety or its unsubstantial character is not self-evident the surety can claim to be discharged. The Court will not then inquire whether it in fact harried the surety.

The strict rule stated in *Pigot's case* 11 Coke 26 (b) that the slightest alteration makes the document void was tempered in subsequent cases and was departed from in *Aldous v. Cornwell*, L. R. (1867-68) 3 Q.B. 573.

Appeal from the Judgment and Decree dated the 30th September, 1957 of the Kerala High Court in Appeal Suit No. 19 of 1956 (T).

T. N. Subramanian Iyer, Senior Advocate, (R. Mahalingier and M. R. Krishna Pillai, Advocates, with him), for Appellant.

V. A. Seiyid Muhammed, Advocate, (*amicus curiae*), for Respondent.

The Court delivered the following Judgments

Kapur, J.—It is not necessary for me to give the facts of this case as they are set out in detail in the judgments of my learned brethren Sarkar and Hidayatullah, JJ. In my opinion this appeal should be dismissed and my reasons are these:

On the findings of the High Court it appears that the Bank had agreed to allow an overdraft to defendant No. 1 for Rs. 20,000 that the appellant gave a surety bond for the repayment of Rs. 25,000 and when that was pointed out to defendant No. 1, the principal debtor, he (the latter) made the alteration in the document by reducing the figure of Rs. 25,000 to Rs. 20,000.

The case of the appellant was not that he never stood surety for defendant No. 1 but that he stood surety for Rs. 5,000 which was subsequently altered to Rs. 20,000 and that any change of figure was a material alteration resulting in the avoidance of the contract, even though the alteration might have been advantageous to him, the obliger. It was argued that howsoever innocent the obligee might

be or howsoever innocent the alteration might have been made so far as it is material the non-accepting obligor—the appellant in this case—cannot be held liable on the obligation in the altered form because he never made or consented to such an obligation and he cannot be held liable on the obligation in the original form because the obligation was never assented to by the creditor—the respondent Bank. Now an unauthorised material alteration avoids a contract so that if a promisee after a written contract has been executed materially alters it without the consent of the promisor whether by adding anything to the contract or striking out any part of it or otherwise the contract is avoided as against the person who was otherwise liable upon it (*Halsbury's Laws of England*), 3rd Edition, Vol. 8, paragraph 301 at page 176). It may also be taken to be the law that even if the alteration is made by a stranger without the knowledge of the promisee the other party is discharged if the contract is in possession of the promisee or his agent. But if the contract is altered by a stranger when the contract was not in the custody of the promisee the promisor is not discharged. (*Halsbury's Laws of England*), 3rd Edition, Vol. 8, paragraph 301, page 176). There is also a further qualification and that is that if a guarantor entrusts a letter of guarantee to the principal borrower and the principal borrower makes an alteration without the assent of the appellant then the guarantor is liable because it is due to the act of the guarantor that the letter of guarantee remains with the principal debtor, in this case defendant No. 1 and what the principal debtor did will estop the guarantor from pleading want of authority (*Williston on Contract*, Vol. VI, paragraph 1914, page 5354).

Thus the position in the present case comes to this. The appellant agreed to stand surety for an overdraft allowed by the respondent Bank to the principal debtor, Shankaran. The Bank required a guarantee in the form which was handed over to the principal debtor, Shankaran. Shankaran got it filled by the appellant for a sum of Rs. 25,000. The Bank did not accept the guarantee up to that limit but wanted the figure to be corrected i.e., by insertion of Rs. 20,000. The document was thereupon handed back to the principal debtor who, it is stated, altered the document. At that stage the principal debtor was acting for and on behalf of the appellant because it was at his instance that the appellant was standing surety and the appellant handed over the deed of guarantee to the principal debtor for the purposes of being given to the bank, the respondent. In these circumstances the avoidance of contract by material alteration is inapplicable because the document was not altered while in possession of the promisee or its agent but was altered by the principal debtor who was at the time acting as the agent of the guarantor, the appellant.

In these circumstances the plea of material alteration is of no avail to the appellant and the appeal must therefore fail and is dismissed but no order as to costs.

Sarkar, J.—This appeal arises out of a suit filed by the respondent Bank against the appellant as the guarantor and one Sankaran as the principal debtor, to recover moneys advanced to the latter on an overdraft account. The suit was decreed against Sankaran by the trial Court and he never appealed from that decree. We will, therefore, be concerned in this appeal only with the claim against the appellant.

The suit against the appellant was based on a letter of guarantee dated 24th May, 1947. It was stated in the plaint that by this letter of guarantee the appellant had undertaken to repay to the Bank the balance due on the overdraft account opened in favour of Sankaran, up to a maximum of Rs. 20,000 which was also the maximum amount for which the overdraft had been arranged. The appellant's defence to the suit was that he had agreed to guarantee the liability of Sankaran on the overdraft up to Rs. 5,000 and had signed the letter guaranteeing there by repayment upto that sum but the letter had been altered without his consent by substituting Rs. 20,000 for Rs. 5,000. The appellant contended in the Courts below as this was a material alteration of the instrument of guarantee, he was absolved of all liability on it.

The trial Court found that the amount guaranteed had originally been mentioned in the letter as Rs. 25,000 and this had been altered without the consent of the appellant to Rs. 20,000. It observed that as it was not disputed that the alteration was material, the suit against the appellant had to be dismissed and passed a decree accordingly, obviously in the view that the alteration had avoided the instrument.

The respondent Bank then appealed to the High Court of Kerala. The High Court agreed with the trial Court that the letter of guarantee originally mentioned Rs. 25,000 and this figure was later altered to Rs. 20,000 without the consent of the appellant. It added that probably the alteration had been made by the principal debtor, Sankaran. It however held that the appellant had mentioned Rs. 25,000 in the place of Rs. 20,000 in the letter probably by a mistake and that the alteration had been made in order to carry out the common intention of Sankaran, the appellant and the Bank that for the overdraft accommodation of Rs. 20,000 allowed to Sankaran the appellant would give a letter of guarantee to the Bank. In this view of the matter the High Court relying on the principle contained in section 87 of the Negotiable Instruments Act, 1881, passed a decree against the appellant.

The appellant has come up to this Court in appeal against the judgment of the High Court. Unfortunately, the Bank, for reasons unknown to us, has not appeared in this appeal. Dr. Seiyid Muhammed argued the case for the Bank at our request and has rendered us great assistance.

Now, the provision of the Negotiable Instruments Act on which the High Court relied, in terms applies to a negotiable instrument which a letter of guarantee is not. The principle of that provision may however be of wider application. That principle has been formulated in *Halsbury's Laws of England*, 3rd Edition, Vol. 11, page 370, in the following words :

"An alteration made in a deed, after its execution, in some particular which is not material does not in any way affect the validity of the deed. It appears that an alteration is not material.... which carries out the intention of the parties already apparent on the face of the deed."

It is now well settled that this principle applies to instruments under hand also: see *ibid*, page 380 footnote (c) and *Master v. Miller*¹.

The question then is, was the alteration in the letter of guarantee of the kind contemplated by this principle? The learned Judges of the High Court thought it was and so held that the letter of guarantee as altered could be enforced. I am unable to accede to that view.

It seems to me that the intention to carry out which an alteration is permissible under the rule on which the High Court has relied, is the intention with which the instrument was executed. That is why in formulating the rule it has been stated in *Halsbury's Laws of England* that the intention has to be "already apparent on the face of the deed." I need only refer to the observation of Le Blanc J. in *Knill v. William*², in support of this proposition.

"If I had thought that there was any evidence on which the jury might have found that the words after wards added had been originally intended to have been inserted, and were omitted by mistake, I should certainly have left it to them so to find; the case of *Kershaw v. Cox*³ being then fresh in my mind; but according to my recollection of the evidence it was impossible for them to draw that conclusion from it. The opinion which I delivered in *Kershaw v. Cox*³ can only be supported on the ground that the alteration there made in the bill the day after it was negotiated was merely the correction of a mistake made by the drawer of it, in having omitted the words, 'or order', which it was intended at the time should be inserted."

The two cases on which the learned Judges of the High Court relied are also cases where the mistake was in writing the instrument. In *Lachmi Rai v. Srideo Rai*⁴, it was found that "the omission regarding the payment of interest was accidental" and in *Ananda Mohan Saha v. Ananda Chandra Naha*⁵, where the instrument originally

1. (1791) 4 Term Rep. 320.

2. 10 East. 431.

3. (1890) 3 Exp. 246 : 170 E. R. 603.

4. A.I.R. 1939 All. 248.

5. (1917) I.L.R. 44 Cal. 154.

provided for interest on a loan of Rs. 200 at Re. 1 per mensem and had been altered by the addition of the words "per cent", it was said "that it was the intention of the parties, as it seems to me to be obvious upon reading the document, that interest was to be paid at the rate of one rupee per cent. per mensem." It seems to me that if it were not so and the intention contemplated in the rule could be gathered from a pre-existing agreement alone without caring to find out the intention with which the instrument was executed, then there would be no justification for the rule. It would then warrant the alteration of an instrument intentionally written in variance with the pre-existing agreement which a person was in law free to do, by the other party to it. That would amount to making a new contract out of a written instrument by unilateral action and in disregard of the intention of the writer. For such a position our laws make no provision. It may be that a person who writes a document in terms which deliberately depart from the agreement pursuant to which it is written, may be liable on that agreement but he cannot be made liable on the document as altered by the other party to the agreement alone even though such alteration makes the document consonant with the agreement.

Now there is absolutely no evidence in this case that in writing the letter of guarantee the appellant had intended to mention the maximum amount of guarantee as Rs. 20,000 and had by mistake written Rs. 25,000 instead. In holding that there was such a mistake, the High Court proceeded purely on the basis of conjecture which is evident from the language used by it. It said, "probably defendant 2" (the appellant) "made a mistake in Exhibit C" (the letter of guarantee). There was not the slightest warranty for this conjecture. In fact the evidence indicates that Rs. 25,000 had been mentioned intentionally in the letter of guarantee. That evidence was given by the Bank's agent too. He said that the overdraft arrangement commenced on 24th February, 1947, when Sankaran executed a promissory note for Rs. 20,000 in favour of the Bank. At that time the appellant was not available to sign the letter of guarantee. The letter was typed by the Bank with blank spaces left for entries to be made by the guarantor regarding the maximum limit of the account, the rate of interest and the date. Sankaran brought this letter back to the Bank in May, 1947. At that time the space for the amount of the limit was filled up with the figure Rs. 25,000. Sankaran said that he required Rs. 25,000 and would renew the promissory note or that amount. The Bank was not prepared to advance to him more than Rs. 20,000 and so the letter of guarantee was returned to Sankaran who then took it away and brought it back some time later with the amount of the maximum limit corrected to Rs. 20,000. This is all the evidence on the question.

I think it right to point out here that the Bank's agent did not speak to any oral agreement with the appellant, nor indeed to any interview with him concerning the overdraft arrangement or the guarantee. The appellant in his written statement no doubt admitted that he had agreed to guarantee the due repayment of the overdraft up to Rs. 5,000: He did not however say that the agreement was verbal but mentioned the letter of guarantee. The appellant's admission can of course be taken against him but it must be taken as made and not a part of it only. Again, no verbal agreement concerning the guarantee had been pleaded anywhere by the Bank, not even in the replication that it filed in answer to the written statement of the appellant alleging that the letter of guarantee having been materially altered no suit lay on it. Lastly, I have to observe that the trial Court did not find that any such oral agreement had been made. If there had been any agreement the letter of guarantee as typed out would have contained no blanks.

In these circumstances it is impossible to hold that there was any prior agreement about the guarantee or its limit, between the appellant and the Bank and if there was not, the High Court's view that in the letter of guarantee Rs. 25,000 had been mentioned by mistake, would lose its foundation. But even assuming pre-existing verbal agreement and in this case the agreement, if any, could only be verbal—the fact that Sankaran made a request that the amount of the overdraft should be increased to Rs. 25,000 would rather indicate that the letter of guarantee

had intentionally stated Rs. 25,000 as the amount of guarantee and this figure had not been written by any mistake. It would be impossible to hold on this evidence that there had been any mistake in writing the letter of guarantee. The evidence does not prove any pre-existing agreement and tends to prove that there had been no mistake in writing the letter of guarantee even if there was an agreement. Therefore it seems to me that the High Court was in error in thinking that the alteration in this case had been made to carry out the intention of the parties. The principle underlying section 87 of the Negotiable Instruments Act has no application to the facts of this case.

Dr. Seiyid Muhammed, however, put the matter from another point of view. He said that in order that an alteration in an instrument made without a party's knowledge might be avoided against him that alteration had to be material and in support of it he referred us to a passage in *Halsbury's Laws of England*, 3rd Edition, Vol. 11, page 380. He then said that no alteration could be material unless it was to the prejudice of a party. He pointed out that the alteration in the present case had reduced the limit of the appellant's liability from Rs. 25,000 to Rs. 20,000 and it was not, therefore, a material alteration. Hence he contended that the letter of guarantee had not been avoided by the alteration.

I do not think that this contention assists the Bank at all. I will assume that an alteration in an instrument which is not to the prejudice of a party to it is not a material alteration and does not release him from his liability under the instrument. This rule, however, does not make the instrument as altered binding on that party. If it did, that would amount to changing by unilateral action the terms of a contract made by common consent or to changing the terms of an offer made by one without his consent. As I have earlier said, none of these things can be done under our law. I may add that I have not been able to find any authority laying down that in such a case the altered instrument would be binding.

All that we would get in this case if Dr. Seiyid Muhammed is right, is that the alteration might be ignored and the instrument in its original form might be considered as existing unaffected by the alteration. In the present case, therefore, we would have a letter of guarantee written by the appellant undertaking to repay the balance due by Sankaran on the overdraft account up to a limit of Rs. 25,000. What then? The suit is not on a contract to guarantee up to a limit of Rs. 25,000. According to the Bank's pleading and evidence there never was any agreement for such a guarantee between it and the appellant. The letter, therefore, cannot be considered as evidence of such a contract. Further the evidence to which I have already referred, proves that as an offer, the letter was not accepted by the Bank. In fact the letter in its original form is of no assistance to the Bank at all in this case, it neither proves a guarantee for Rs. 25,000 nor for Rs. 20,000.

But it is said that the letter contained an enforceable contract as it was supported by consideration which had already moved from the Bank, namely, the advance made to Sankaran before the date of the letter and the promise to make further advances. Then it is said that inadequacy of consideration does not avoid a contract as stated in *Explanation 2* of section 25 of the Contract Act, 1872, and therefore the Bank's undertaking to advance upto Rs. 20,000 could support the appellants' promise to guarantee upto Rs. 25,000. But it is not the Bank's case that there was such a contract of guarantee. Its case was that the contract of guarantee was for Rs. 20,000. That contract is not supported by the letter on which alone the suit is based. If there was no contract as stated in the letter, then no question of consideration to support it can possibly arise. Therefore, it seems to me that the contention that the alteration was immaterial and did not affect the instrument so far as the appellant is concerned is to no purpose in the present case.

The position may then be thus stated. We have a suit against the appellant based on a written contract to guarantee repayment of Sankaran's dues to the Bank upto Rs. 20,000. There is no evidence of any verbal contract of guarantee.

The appellant wrote a letter guaranteeing repayment of those dues upto Rs. 25,000. Sankaran also signed this letter but that signature is of no consequence to the question of guarantee which alone arises in this appeal for Sankaran could not guarantee his own debt and his signature would therefore only be evidence of his liability for the amount advanced to him by way of overdraft. Such liability, however, he had already undertaken by executing a promissory note for Rs. 20,000 in favour of the Bank. His signature on the letter of guarantee therefore made no difference in the legal relations that have to be considered in this appeal. Returning now to the letter of guarantee written by the appellant, the Bank refused to accept that letter and, therefore, on the Bank's own case no contract on its terms was ever made. That letter was altered without the consent of the appellant probably by Sankaran by substituting Rs. 20,000 for Rs. 25,000. If the alteration was without the appellant's consent, it could not have been authorised by him; if it had been consent would be implied. There is further neither evidence, nor pleading nor finding of any such authority. The altered document is not binding on the appellant for the alteration had not been made to carry out the intention of the parties. If the alteration is ignored, then the document creates no liability in the appellant, for the Bank refused to accept a guarantee on the terms contained in the document before it was altered. Further, the contract sued upon is different from the contract which might have been made by the document as it stood before the alteration. The unaltered document cannot establish the contract sued upon.

The conclusion to which I arrive then is that the suit against the appellant as framed must fail. I would, therefore, allow the appeal with costs here and below and dismiss the suit against the appellant.

Hidayatullah, J.—I have had the advantage of reading the judgment prepared by my brother Sarkar. In my opinion, and I say it with great respect this appeal must fail. I shall give my reasons briefly.

The facts of the case are simple. The suit, out of which this appeal arises, was filed by the Thomco's Bank, Ltd., Trivandrum, (to be called in this judgment the 'Bank') against V. Sankaran (the principal debtor) and M.S. Anirudhan (the surety and appellant before us). The suit was based against V. Sankaran on a promissory note executed by him in favour of the Bank on 24th February, 1947, (Exhibit B) and against the present appellant on a letter of guarantee dated 24th May, 1947. In so far as Sankaran has not appealed against the decree passed against him we need not mention the facts leading up to the promissory note which was prior in time. Anirudhan in defending himself stated that the letter of guarantee was for Rs. 5,000 and that it had been altered without his knowledge and consent into a sum of Rs. 20,000. The letter of guarantee is Exhibit C and original does show two corrections in the figures as well as the written words mentioning the amount. Figure "5" in the amount of Rs. 25,000 in figures appears to have been altered to "O"; and in the words "Rupees twenty-five thousand" the word "five" has been struck out. The appellant's case that 5,000 in figures was altered to 20,000 by the addition of the figure "2" and the alteration of the figure "5" into "O" and the corresponding change in the words by the addition of the words "twenty" and the scoring out of word "five" has not been believed. Thus the case made out by Anirudhan has not been accepted. The correction, however, is patent and the question that has arisen in this case is whether by the alteration of the letter of guarantee the surety is discharged.

The finding of the High Court is that there was no prior oral agreement between the Bank and Anirudhan. This letter, as is obvious from the dates, was given after the loan had already been made. The contention of the Bank was that when Sankaran brought this letter and asked for additional loan of Rs. 5,000 the Bank refused to advance any further amount and declined to accept this letter of guarantee for Rs. 25,000 lest the Bank might be compelled to loan a further sum of Rs. 5,000. Sankaran then took back the letter and after some time brought it back with the figure "5" changed into "O" and the word "five" scored out.

These corrections were not initialled either by Sankaran or by Anirudhan. The Bank, however, accepted this letter and kept it and sued Anirudhan upon it. The question is whether Anirudhan's liability is discharged by the alteration in the document which alteration is not proved to have been made either by him or with his knowledge or consent.

It is conceded and indeed it is the law that only a material alteration makes a document void. It is also the law that if the custodian of the document makes or allows an alteration to be made while the document is in his custody he cannot sue upon it because it is his duty to preserve the document in the state in which he got it. In the present case, the document was not altered by the Bank nor with the Bank's consent or connivance while the document was in its custody. The document was apparently altered either by Anirudhan or by Sankaran or by both. If it was altered by Anirudhan, or by him and Sankaran together, the document still remains the document of Anirudhan and the suit of the Bank based upon it is competent against him. If it was altered by Sankaran the question is whether the alteration was a material alteration to make it void against Anirudhan. The High Court is of the opinion that it was not material. I am inclined to accept the conclusion of the High Court. Anirudhan by the letter to the Bank wished to guarantee an overdraft of Sankaran not exceeding Rs. 25,000. His case that it was Rs. 5,000 and not Rs. 25,000 has been disbelieved. The document was originally written for an amount of Rs. 25,000 which was reduced to Rs. 20,000, I will assume, by Sankaran and the letter of guarantee was accepted by the Bank. The question is whether by the reduction of the amount of the guarantee Anirudhan can say that the document executed by him has been materially altered and his liability is at an end. In my judgment in the present case it cannot be said. The document still continues to represent what was intended by Anirudhan. That intention was to guarantee a loan upto Rs. 25,000 which includes the sum for Rs. 20,000 for which the guarantee now stands. The question is whether Anirudhan can say that this guarantee is at an end.

There are really two defences open to Anirudhan, the surety. The first is that he had offered to stand surety on certain terms and as those conditions have been altered he is discharged from any liability. The second also depends on the alteration and it is that a document executed by him has been materially altered and is therefore void. This is a plea of *non est factum*. Both the arguments rest upon the alteration of the contract into which Anirudhan wished to enter. A surety is considered a "favoured debtor" and his liability is *strictissimi juris*. Lord Westbury L.C., in *Blest v. Brown*¹, stated this liability in the following words :—

"It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into. If that written engagement is altered in a single line, no matter whether the alteration be innocently made, he has a right to say, 'The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end.'"

It is not necessary to go into the facts of that case where the surety guaranteed fulfilment of a contract for the supply of flour to a baker who in his turn had undertaken to supply bread to Government. The case turned upon stipulations by the Government and their breach and the decision cannot be regarded a direct authority, apart from the general observation, in the present case. The statement of the law in *Blest v. Brown*¹, was considered by the Court of Appeal in *Holme v. Brunskill*² in an appeal from a judgment of Denman, J. (later Lord Denman). Cotton, L.J., stated the law in these words :—

"The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it

1. (1862) 45 E. R. 1225.

2. L.R. (1878) 3 Q.B.D. 495.

is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court, will not in an action against the surety, go into an inquiry as to the effect of the alteration

To this statement of the law, must be added the dissent of Brett, L.J. who stated that the surety in that case was not released observing that the doctrine of release of sureties was carried far enough and that he would not carry it any further. There is noticeable a difference between the strict rule stated by Lord Westbury and that stated by Cotton L. J. and the law now accepts that unsubstantial alterations which are to the benefit of the surety do not discharge the surety from the liability. Of course, if the alteration is to the disadvantage of the surety, or its unsubstantial character is not self-evident the surety can claim to be discharged. The Court will not then inquire whether it in fact harmed the surety. That dictum of Cotton L.J. was quoted with approval by the Judicial committee in *Ward v. The National Bank of Newzealand Limited*¹. Other cases in which a similar liberal view is taken are mentioned in these two decisions.

Before I examine the position of Anirudhan with regard to the law applicable to sureties, I wish to refer to the law relating to the alteration of documents. These two matters really go together in this case. Here, again, the strict rule at one time was that the slightest alteration makes the document void. The leading case for a long time was *Pigots case*², where Lord Coke stated the doctrine as follows:—

"These points were resolved: 1. When a lawful deed is raised, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of the plea pleaded, it is not his deed."

"Secondly, it was resolved that when any deed is altered in a point material by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, raising, or by drawing of a pen through a line, or though the midst of any material word, that the deed thereby becomes void. So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void but if a stranger, without his privity, alters the deed by any of the said ways in any point material, it shall not avoid the deed."

The passage is also to be found in an article "Discharge of Contracts by Alteration" by Williston in 18 Harvard Law Review, page 105. The strictness of this rule was tempered in subsequent cases and was departed from in *Aldous v. Cornwell*³ where Lush, J. (speaking for Cockburn, C. J., Blackburn, J., and himself), after referring to numerous authorities, observed—

"This being the state of the authorities, we think we are not bound by the doctrine of *Pigot's case* or the authority cited for it; and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice any one, destroys the validity of the note. It seems to us repugnant to justice and commonsense to hold that the maker of a promissory note is discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied if the words had not been written."

What is said here about an addition or alteration of a promissory note was prior to the enactment of the rule in Bills of Exchange Act in England which has altered the law with regard to negotiable instruments but the observations apply forcefully to document of the type we have where there were two executants (one being the debtor and the other his surety) and the debtor has not increased but reduced the amount of his own liability as well as that of his surety. That immaterial alterations do not matter is borne out by the observation of Swinfen Eady, J., in *Bishop of Crediton v. Bishop of Exeter*⁴, where *Pigot's case*² and the earlier statement of the Law in Sheppard's Touchstone, 7th edition (Preston's) page 55, were not accepted. During the course of the argument Swinfen Eady, J., referred to cases in which corrections in the testimonium of documents to accord them with existing facts were held not to be material alterations. The question before me is whether a document jointly executed by two persons creating a liability equal for both is to be regarded as materially altered if the liability is reduced equally for both but the alteration is made only by one of them. In my opinion, such an alteration must be regarded as unsubstantial and not otherwise than beneficial to the surety and

1. L.R. 8 App. Cas. 755.
2. 11 Coke 26 (b).

3. L.R. (1867-68) 3 Q.B. 573.
4. (1905) 2 Ch. 455.

it cannot attract the strict rule stated by Lord Coke or that stated by Lord Westbury in the cited cases.

Let me give an example : If *A* places an order with a trader for supply on credit of ten bags of wheat and *B* endorses the order by writing, "I guarantee payment upto ten bags" can it be said that the guarantee by *B* is dissolved when *A* takes the note and finding that the tradesman has only six bags of wheat in stock, corrects his order as well as the endorsement by altering 'ten' into 'six'? In my opinion, to such a correction neither the one rule nor the other can apply. The strict rule of law which was brought to our notice from the well-known *Suffell's Case*¹, where a Bank of England note was mutilated and its number destroyed depended upon its special facts. The number of the Bank of England note was considered its vital part and the alteration a material alteration. *Suffell's Case*¹, was not followed by the Privy Council in a case where a Bank note issued by a Bank which was only a contract and not currency, as in the other case, was destroyed because the owner had forgotten that the note was in the pocket of a garment and the garment had been washed. The note was reconstructed and showed the contract but not the number. The Privy Council held the Bank liable even though the contract had been altered by eraser [see *Hong Kong and Shanghai Banking Corporation v. Lo Lee Shi*²].

These cases establish that both the limbs of the argument which Anirudhan can raise are not valid in the circumstances of this case. In my judgment, the particular document in this case cannot be said to have been materially altered, because it has not been altered in such a manner as to change its nature. The alteration does not save the surety from liability arising under it. The alteration was made by a co-executant who reduced not only his own liability but that of the surety also. Indeed, the surety himself understood the law to be this because he set up the case that the document originally guaranteed an overdraft of Rs. 5,000 but was altered to guarantee an overdraft of Rs. 20,000. This case has been proved false and he never set-up the case that the document was void because the amount was reduced from Rs. 25,000 to Rs. 20,000. It does not lie in the mouth of Anirudhan to say that he meant to guarantee Rs. 25,000 but not Rs. 20,000 because he never went to the Bank and made this a condition of the agreement. Now he cannot say that the document has become void against him or that the contract which had emerged by the Bank's acceptance of the document as altered does not bind him.

There is no need, in my opinion, to consider whether there was a prior oral agreement or not. I agree there is no proof of such an agreement. The letter of Anirudhan to the Bank was based on a consideration which had already moved to Sankaran and which Anirudhan wished to guarantee. Even if treated as an offer by Anirudhan to the Bank, the Bank accepted the amended offer and Sankaran must be deemed to have had the authority to reduce the amount, though not to increase it. The document was altered while in the possession of the very person who, as the agent of Anirudhan, brought it to the Bank on both the occasions. Anirudhan must be deemed to have held out Sankaran as his agent for this purpose and this creates an estoppel against Anirudhan, because the Bank believed that Sankaran had the authority. The offer thus remains in its amended form an offer of Anirudhan to the Bank and the Bank by accepting it turned it into a contract of guarantee which was backed by the past consideration on which the offer of Anirudhan was originally based.

In my opinion, the appeal must fail. I would, therefore, dismiss it.

ORDER:

In accordance with the opinion of the majority, the appeal is dismissed. There would be no order as to costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—B. P. SINHA, *Chief Justice*, S. J. IMAM, K. SUBBA RAO, K. N. WANCHOO, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

The Gujarat University and others.

*Appellants**

Shri Krishna Ranganath Mudholkar and others

Respondents.

The Principal, St. Xavier's College, Ranchi and others

Intervenors.

Gujarat University Act of 1949 as amended by Act IV of 1961, section 4 (27)—Gujarati or Hindi or both as the exclusive medium or media of instruction and examination in the affiliated colleges—No power under the Act to the University to prescribe—Legislation authorising University to impose such medium—If infringes Item No. 66 of List II, VII Schedule, Constitution.

Constitution of India, 1950, Item 11 of List II, Item 25 of List III and Items 63 to 66 of List I—Scope and extent of the legislative power—Item 11 of List II and Item 66 of List I must be harmoniously construed—Medium of instruction—Not a separate legislative head—Power to indicate the medium with respect to the content of each Entry. But subject to Entry No. 66 of List I—Co-ordination and determination of standards in institutions of higher education—Doctrine of pith and substance.

Neither under the Act as originally framed nor under the Act as amended by Act IV of 1961 was there any power conferred on the University to impose Gujarati or Hindi or both as exclusive medium or media of instruction and examination and if no such power was conferred upon the University, the Senate could not exercise such a power. The Senate is a body acting on behalf of the University and its powers to enact Statutes must lie within the contour of the powers of the University conferred by the Act.

By Item No. 11 of List II of the Seventh Schedule to the Constitution, the State Legislature has power to legislate in respect of "education including Universities subject to the provisions of Items 63, 64, 65 and 66 of List I and 25 of List III.

Item 25 of the Concurrent List confers power upon the Union Parliament and the State Legislatures to enact legislation with respect to "vocational and technical training of labour". It is manifest that the extensive power vested in the Provincial Legislatures to legislate with respect to higher, scientific and technical education and vocational and technical training of labour, under the Government of India Act is under the Constitution controlled by the five items in List I and List III mentioned in Item 11 of List II. Items 63 to 66 of List I are carved out of the subject of education and in respect of these items the power to legislate is vested exclusively in the Parliament. Use of the expression "subject to" in Item 11 of the List II of the Seventh Schedule clearly indicates that legislation in respect of excluded matters cannot be undertaken by the State Legislatures.

Item 11 of List II and Item 66 of List I must be harmoniously construed. The two entries undoubtedly overlap: but to the extent of overlapping, the power conferred by Item 66 of List I must prevail over the power of the State under Item 11 of List II. It is manifest that the excluded heads deal primarily with education in institutions of national or special importance and institutions of higher education including research, science technology and vocational training of labour. The power to legislate in respect of primary or secondary education is exclusively vested in the States by Item 11 of List II, and power to legislate on medium of instruction in institutions of primary or secondary education must therefore rest with the State Legislatures. Power to legislate in respect of medium of instruction is, however, not a distinct legislative head; it resides with the State Legislatures in which the power to legislate on education is vested, unless it is taken away by necessary intendment to the contrary. Under Items 63 to 65 the power to legislate in respect of medium of instruction having regard to the width of those items, must be deemed to vest in the Union. Power to legislate in respect of medium of instruction, in so far it has a direct bearing and impact upon the legislative head of co-ordination and determination of standards in institutions of higher education or research and scientific and technical institutions, must also be deemed by Item 66, List I to be vested in the Union.

The State has the power to prescribe the syllabi and courses of study in the institutions named in Entry 66 (but not falling within Entries 63 to 65) and as an incident thereof it has the power to indicate the medium in which instruction should be imparted. But the Union Parliament has an overriding legislative power to ensure that the syllabi and courses of study prescribed and the medium selected do not impair standards of education or render the co-ordination of such standards either on an All India or other basis impossible or even difficult. Thus, though the powers of the Union and of the State are in the exclusive Lists, a degree of overlapping is inevitable.

The question of repugnancy and paramountcy may have to be resolved on the application of the "doctrine of pith and substance" of the impugned enactment. The validity of the State Legislation on University education and as regards the education in technical and scientific institutions not

falling within Entry 64 of List I would have to be judged having regard to whether it impinges on the field reserved for the Union under Entry 66. In other words, the validity of State legislation would depend upon whether it prejudicially affects co-ordination and determination of standards, but not upon the existence of some definite Union legislation directed to achieve that purpose. If there be Union legislation in respect of co-ordination and determination of standards, that would have paramountcy over the State law by virtue of the first part of Article 254 (1); even if that power be not exercised by the Union Parliament the relevant legislative entries being in the exclusive Lists, a State law trenching upon the Union field would still be invalid.

Item 66 is a legislative head and in interpreting it, unless it is expressly or of necessity found conditioned by the words used therein, a narrow or restricted interpretation will not be put upon the generality of the words. Power to legislate on a subject should normally be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in that subject. Again there is nothing either in Item 66 or elsewhere in the Constitution to indicate that the expression "co-ordination" must mean in the context in which it is used merely evaluation. Co-ordination in its normal connotation means harmonising or bringing into proper relation in which all the things co-ordinated participate in a common pattern of action. The power to co-ordinate, therefore, is not merely power to evaluate, it is a power to harmonise or secure relationship for concerted action. The power conferred by Item 66, List I is not conditioned by the existence of a state of emergency or unequal standards calling for the exercise of the power. There is nothing in the entry which indicates that the power to legislate on co-ordination of standards in institutions of higher education, does not include the power to legislate for preventing the occurrence of or for removal of disparities in standards.

It is true that "medium of instruction" is not an item in the Legislative List. It falls within Item 11 as a necessary incident of the power to legislate on education; it also falls within Items 63 to 66, in so far as it is a necessary incident of the powers under Item 66, List I, it must be deemed to be included in that item and therefore excluded from Item 11, List II. How far State legislation relating to medium of instruction in institutions has impact upon co-ordination of higher education is a matter which is not susceptible, in the absence of any concrete challenge to a specific statute, of a categorical answer. Manifestly, in imparting instructions in certain subjects, medium may have subordinate importance and little bearing on standards of education while in certain others its importance for professional course like law, engineering, medicine and the like existence of adequate text-books at a given time, the existence of journals and other literature availability of competent instructors and the capacity of students to understand instructions imparted through the medium in which it is imparted are matters which have an important bearing on the effectiveness of instruction and resultant standards achieved thereby. If adequate text-books are not available or competent instructors in the medium, through which instruction is directed to be imparted are not available, or the students are not able to receive or imbibe instructions through the medium in which it is imparted, standards must of necessity fall, and legislation for co-ordination of standards in such matters would include legislation relating to medium of instruction.

By the amendment of the Proviso to section 4 (27), the Legislature purported to continue the use of English as the medium of instruction in subjects selected by the Senate beyond a period of ten years prescribed by the Gujarat University Act, 1949. Before the date on which the parent Act was enacted, English was the traditional medium of instruction in respect of all subjects at the University level. By enacting the proviso as it originally stood, the University was authorised to continue the use of English as an exclusive medium of instruction in respect of certain subjects to be selected by the Senate. By the amendment it is common ground that no power to provide an exclusive medium other than the pre-existing medium is granted. Manifestly, imparting instruction through a common medium, which was before the Act the only medium of instruction all over the country, cannot by itself result in lowering standards and co-ordination and determination of standards cannot be affected thereby. By extending the provisions relating to imparting of instruction for a period longer than ten years through the medium of English in the subjects selected by the University, no attempt was made to encroach upon the powers of the Union under Item 66, List I.

A Corporation has ordinarily an implied power to carry out its objects; power to indicate a medium of instruction in affiliated or constituent colleges may therefore be deemed to be vested in a University but the power to indicate a medium of instruction does not carry with it, in the absence of an express provision, power to impose upon the affiliated institutions an exclusive medium of instruction.

Per *Subba Rao, J.*—When a question arises under what entry an impugned legislation falls the Court directs its mind to ascertain the scope and effect of the legislation and its pith and substance. Decided cases afford many criteria to ascertain its scope, namely, comparison of conflicting entries, effect of the impugned legislation, its object and purpose, its legislative history, its colourable nature and similar others—all or some of them would be useful guides to get at the core of the legislation. But no authority has gone so far as to hold that even if the pith and substance of an Act falls squarely within the limit of a particular entry, it should be struck down on the speculative and anticipatory ground that it may come into conflict with a law made by a co-ordinate Legislature by virtue of another entry. If the impact of a State law on a Central subject is so heavy and devastating as to wipe out or appreciably abridge the Central field, then it may be a ground for holding that the State law is a colourable exercise of power and that in pith and substance it falls not under the State entry but under the Union entry. The case law, therefore, does not warrant the acceptance of a new doctrine *de hors* that of pith and substance.

Entry 11 of List II takes in the medium of instruction and it is not comprehended by the phraseology of Entry 66 of List I of the VII Schedule to the Constitution. It follows that the State Legislature can make a law empowering the University to prescribe a regional language as the exclusive medium of instruction.

Appeals from the Judgment and Order dated the 24th January, 1962 of the Gujarat High Court in Special Civil Application No. 624 of 1961.

J. C. Bhatt and H. K. Thakore, Advocates and *V. J. Merchant*, Advocate of *M/s. Gagrati & Co.*, for Appellants (In C.A. No. 234 of 1962) and Respondents Nos. 2 and 3 (In C.A. No. 262 of 1962).

N. A. Palkhivala, Senior Advocate (*C. T. Daru*, Advocate, and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent No. 1 (In both the Appeals).

M. C. Setalvad, Attorney-General for India and *J. M. Thakore*, Advocate-General for the State of Gujarat (*M. G. Doshi* and *R. H. Dhebar*, Advocates, with them), for Respondent No. 3 (In C.A. No. 234 of 1962) and the Appellant (In C.A. No. 262 of 1962).

I. M. Nanavati and *R. Gopalakrishnan*, Advocates for Intervener No. 1 (In C.A. No. 234 of 1962).

Frank Anthony, *Charanjit Talwar* and *P. C. Agarwala*, Advocates and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Intervener No. 2 (In both the Appeals).

The Court delivered the following Judgments :

Shah, J. (on behalf of the majority).—Shrikant, son of Shri Krishna Mudholkar, appeared for the Secondary School Certificate Examination held by the State of Bombay in March, 1960, and was declared successful. He took instruction in the various subjects prescribed for the examination through the medium of Marathi (which is his mother-tongue) and answered the questions at the examination also in the medium of Marathi. Shrikant joined the St. Xavier's College affiliated to the University of Gujarat in the First Year Arts class and was admitted in the section in which instructions were imparted through the medium of English. After successfully completing the First Year Arts course in March, 1961, Shrikant applied for admission to the classes preparing for the Intermediate Arts examination of the University through the medium of English. The Principal of the College informed Shrikant that in view of the provisions of the Gujarat University Act, 1949, and the Statutes 207, 208 and 209 framed by the Senate of the University, as amended in 1961 he could not without the sanction of the University permit him to attend classes in which instructions were imparted through the medium of English. Shri Krishna, father of Shrikant, then moved the Vice-Chancellor of the University for sanction to permit Shrikant to attend the "English medium classes" in the St. Xavier's College. The Registrar of the University declined to grant the request but by another letter Shrikant was "allowed to keep English as a medium of examination" but not for instruction.

A petition was then filed by Shri Krishna Madholkar on behalf of himself and his minor son Shrikant in the High Court of Gujarat for a writ or order in the nature of *mandamus* or other writ, direction or order requiring the University of Gujarat to treat sections 4 (27) 18 (i) (xiv) and 38-A of the Gujarat University Act, 1949 and Statutes 207, 208 and 209 as void and inoperative and to forbear from acting upon or enforcing those provisions and requiring the Vice-Chancellor to treat the letters or circulars issued by him in connection with the medium of instruction as illegal and to forbear from acting upon or enforcing the same, and also requiring the University to forbear from objecting to or from prohibiting the admission of Shrikant to "the English medium Intermediate Arts class" and requiring the Principal of the College to admit Shrikant to the "English medium Intermediate Arts class" on the footing that the impugned provisions of the Act, Statutes and letters and circulars were void and inoperative.

The High Court of Gujarat by order dated 24th January, 1962, issued the writs prayed for. The University and the State of Gujarat have separately appealed to this Court with certificates of fitness granted by the High Court.

The judgment of the High Court proceeded upon diverse grounds which are summarised in their judgment as follows :—

(1) Statutes 207 and 209 in so far as they seek to lay down and impose Gujarati and/or Hindi in Devanagiri script as media of instruction and examination in institutions other than those maintained by the University are unauthorised and therefore null and void, for neither section 4 (27) nor any other provision of the Act empowers the University to lay down Gujarati or Hindi as a medium of instruction and examination in such institutions or to forbid the use of English as a medium of instruction and examination for and in such institutions ;

(2) In any event, the University has the power only to lay down Gujarati or Hindi as one of the media of instruction and examination and not as the only medium of instruction and examination to the exclusion of other languages ;

(3) The proviso to clause 27 of section 4 of the Gujarat University Act as amended by Act IV of 1961 constitutes an encroachment on the field of Entry 66 of List I of the Seventh Schedule to the Constitution and is therefore beyond the legislative competence of the State and the Statutes 207 and 209 made thereunder are null and void ; and

(4) Even if on a true construction of section 4 (27) and other provisions of the Act, the University is authorised to prescribe a particular language or languages as medium or media of instruction and examination for affiliated colleges and to prohibit the use of English as a medium of instruction and examination in affiliated colleges, the provisions authorising the imposition of exclusive media and the Statutes and circulars issued in pursuance thereof are void and infringing Articles 29 (1) and 30 (1) of the Constitution.

We have declined to hear arguments about the alleged infringement of fundamental rights under Articles 29 (1) and 30 (1), by the Act assuming it authorises imposition of Gujarati or Hindi as an exclusive medium of instruction, for, in our view, the petition suffers from a singular lack of pleading in support of that case, and even the St. Xavier's College authorities who had at one stage adopted a non-contentious attitude but later supported the case of the petitioner, did not choose to place evidence on the record which would justify the Court in entering upon an investigation of this plea of far-reaching importance. Manifestly, the decision of the question whether such legislation infringes Articles 29 (1) and 30 (1) depends upon proof of several facts such as existence of a distinct language, script or culture of a section of citizens for whom the St. Xavier's College caters or the existence of a minority based on religion or language having been by the enactment of the impugned legislation obstructed or likely to be obstructed in the exercise of its rights to establish and administer educational institutions of its choice. We, therefore, express no opinion on the question whether the provisions of the Act and the Statutes and circulars issued infringe any fundamental rights of any section of citizens or any minority, religious or linguistic. We must, however, make it clear that we refuse to decide the question not because the petitioner had no right to maintain the petition under Article 226 of the Constitution as contended by the University and the State of Gujarat, but because of the paucity of pleading and evidence on the record.

Two substantial questions survive for determination—(1) whether under the Gujarat University Act, 1949 it is open to the University to prescribe Gujarati or Hindi or both as an exclusive medium or media of instruction and examination in the affiliated colleges, and (2) whether legislation authorising the University to impose such media would infringe Entry 66 of List II Seventh Schedule to the Constitution.

St. Xavier's College was affiliated to the University of Bombay under Bombay Act IV of 1928. The Legislature of the Province of Bombay enacted the Gujarat University Act, 1949 to establish and incorporate a teaching and affiliating University " as a measure of decentralisation and re-organisation " of University education in the Province. By section 5 (3) of the Act, from the prescribed date all educational institutions admitted to the privileges of the University of Bombay and situate within the University area of Gujarat were deemed to be admitted to the privileges of the University of Gujarat. Section 3 incorporated the University with perpetual

succession and a common seal. Section 4 of the Act enacted a provision which is not normally found in similar Acts constituting Universities. By that section various powers of the University were enumerated. These powers were made exercisable by diverse authorities of the University set out in section 15. We are concerned in these appeals with the Senate, the Syndicate and the Academic Council. Some of the powers conferred by section 4 were made exercisable by section 18 by the Senate. The Senate was by that section authorised, subject to conditions as may be prescribed by or under the provisions of the Act, to exercise the powers and to perform the duties as set out in sub-section (1). By section 20 certain powers of the University were made exercisable by the Syndicate, and by section 22, the Academic Council was invested with the control and general regulation of, and was made responsible for, the maintenance of standards of teaching and examinations of the University and was authorised to exercise certain powers of the University. The powers and the duties of the Senate are to be exercised and performed by the promulgation of Statutes of the Syndicate by Ordinances and of the Academic Council by Regulations. In 1954, the Gujarat University framed certain Regulations dealing with the media of instruction. They are Statutes 207, 208 and 209, Statute 207 provided :—

(1) Gujarati shall be medium of Instruction and Examination.

(2) Notwithstanding anything in clause (1) above, English shall continue to be the medium of instruction and examination for a period not exceeding ten years from the date on which section 3 of the Gujarat University Act comes into force, except as prescribed from time to time by Statutes.

(3) Notwithstanding anything in clause (1) above, it is hereby provided that non-Gujarati students and teachers will have the option, the former for their examination and the latter for their teaching work, to use Hindi as the medium, if they so desire. The Syndicate will regulate this by making suitable Ordinances in this behalf, if, as and when necessary.

(4) Notwithstanding anything in (1), (2), (3) above, the medium of examination and instruction for Modern Indian Languages and English may be the respective languages.

Statute 208 provided that the medium of instruction and examination in all subjects from June, 1955 in First Year Arts, First Year Science and First Year Commerce in all subjects and from June, 1956 in Inter Arts, Inter Science, Inter Commerce and First Year Science (Agri.) shall cease to be English and shall be as laid down in Statute 207 (1). This Statute further provided that a student or a teacher who feels that he cannot "use Gujarati or Hindi tolerably well", would be permitted the use of English in examination and instruction respectively up to November, 1960 (which according to the academic year would mean June, 1961) in one or more subjects. Statute 209 is to the same effect enumerating therein the permitted use of English for the B.A., B.Sc., and other examinations. After the constitution of a separate State of Gujarat, Act IV of 1961 was enacted by the Gujarat State Legislature. By that Act the proviso to section 4 (27) was amended so as to extend the use of English as the medium of instruction beyond the period originally contemplated and section 38-A which imposed an obligation upon all affiliated colleges and recognised institutions to comply with the provisions relating to the media of instruction was enacted. It was provided by section 38-A (2) that if an affiliated college or recognised institution contravenes the provisions of the Act, Rules, Ordinance and Regulations in respect of media of instruction the rights conferred on such institution or college shall stand withdrawn from the date of the contravention and that the college or institution shall cease to be affiliated college or recognised institution for the purpose of the Act. The Senate of the University thereafter amended Statutes 207 and 209. Material part of Statute 207 as amended is as follows :—

(1) Gujarati shall be the medium of instruction and examination :

Notwithstanding anything contained in sub-item (1) above, Hindi will be permitted as an alternative medium of instruction and examination in the following faculties :

(i) Faculty of Medicine,

(ii) Faculty of Technology including Engineering, and

(iii) Faculty of Law; and

(iv) in all faculties for post-graduate studies.

(2) Notwithstanding anything contained in clause (1) above, English may continue to be the medium of instruction and examination for such period and in respect of such subjects and courses of studies as may, from time to time, be prescribed by the Statutes under section 4 (27) of the Gujarat University Act for the time being in force.

(3) Notwithstanding anything contained in clause (1) above, it is hereby provided that students and teachers, whose mother-tongue is not Gujarati will have the option, the former for their examination and the latter for their instruction to use Hindi as the medium, if they so desire.

(4) Notwithstanding anything contained in clauses (1) and (3) above, it is hereby provided that the affiliated Colleges, recognised Institutions and University Departments, as the case may be, will have the option to use, for one or more subjects, Hindi as a medium of instruction and examination for students whose mother-tongue is not Gujarati.

(5) Notwithstanding anything in clauses (1), (2), (3) and (4) above, the medium of examination and instruction for modern Indian languages and English may be the respective languages.

Statute 209 as amended provides that the medium of instruction and examination in all subjects in the examinations enumerated therein shall cease to be English and shall be as laid down in Statute 207 as amended with effect from the years mentioned against the respective examinations.

The Registrar of the University thereafter issued a circular on 22nd June, 1961, addressed to Principals of Affiliated Colleges stating that the Vice-Chancellor in exercise of the powers vested in him under section 11 (4) (a) of the Act was pleased to direct that—

(i) Only those students who have done their Secondary education through the medium of English and who have further continued their studies in First Year (Pre-University) Arts Class in the year 1960-61 through English, shall be permitted to continue to use English as the medium of their examination in the Intermediate Arts Class for one year i.e. in the year 1961-62, and

(ii) the colleges be permitted to make arrangements for giving instructions to students mentioned in (i) above through the medium of English for only one year, i.e., during the academic year 1961-62, and

(iii) that the Principals shall satisfy themselves that only such students as mentioned in (i) above are permitted to avail themselves of the concession mentioned therein.

Shrikant had not appeared at the S.S.C. Examination in the medium of English and under the first clause of the circular he could not be permitted by the Principal of the St. Xavier's College to continue to use English as the medium of instruction in the Intermediate Arts class: if the Principal permitted Shrikant to do so the College would be exposed to the penalties prescribed by section 38-A.

The petitioner challenged the authority of the University to impose Gujarati or Hindi as the exclusive medium of instruction under the powers conferred by the Gujarat University Act, 1949, as amended by Act IV of 1961. The University contended that authority in that behalf was expressly conferred under diverse clauses of section 4, and it being the duty of the Senate to exercise that power under section 18 (xiv), Statutes 207 and 209 were lawfully promulgated. In any event, it was submitted the University being a Corporation invested with control over higher education for the area in which it functions such a power must be deemed to be necessarily implied.

In considering whether power to impose Gujarati or Hindi or both as exclusive medium of instruction is conferred upon the University by the Gujarat University Act, 1949, clauses (1), (2), (7), (8), (10), (14), (27) and (28) of section 4 only need be considered. By clause (1) power is conferred upon the University "to provide for instruction, teaching and training in such branches of learning and courses of study as it may think fit to make provision for research and dissemination of knowledge". We do not, having regard to the phraseology used by the Legislature, agree with the High Court that this power is restricted in its exercise to institutions set up by the University and does not extend to affiliated colleges. The language used in the clause does not warrant this restriction. But we agree with the High Court that the power conferred by clause (1) does not relate primarily to the medium of instruction but to the syllabi in diverse branches of learning and courses of study. The clause confers authority upon the University to direct that instruction, teaching and training be imparted in different branches of

learning and courses of study as the University thinks fit, but not to prescribe an exclusive medium in which instruction in the branches of learning and courses of study is to be imparted. Clause (2) which authorises the University "to make such provision as would enable affiliated colleges and recognised institutions to undertake specialisation of studies," has no direct bearing on the subject of an exclusive medium of instruction. Nor does clause (7) which enables the University "to lay down the courses of instruction for various examinations" authorise the University to prescribe an exclusive medium of instruction. Clause (8) which confers power "to guide the teaching in colleges or recognised institutions" has no bearing on the power to prescribe an exclusive medium. Power to designate branches of learning, or courses of study in which instruction is to be imparted, or power to take steps to facilitate specialised studies, or to guide teaching in institutions affiliated to or recognised by the University undoubtedly includes the power to indicate the medium through which instructions were at the date of the Act normally imparted, but that power by itself does not include, in the absence of a provision express or by clear implication power to compel instruction through an exclusive medium. Clause (10) provides that the University shall have the power "to hold examinations and confer degrees, titles, diplomas and other academic distinctions on persons who (a) have pursued approved courses of study in the University or in an affiliated college unless exempted therefrom in the manner prescribed by the Statutes, Ordinances, and Regulations and have passed the examination prescribed by the University, or (b) have carried on research under conditions prescribed by the Ordinances and Regulations." Counsel for the University contended that by clause 10 (a), the University had the authority to approve courses of study in the manner prescribed by the Statutes, Ordinances and Regulations and as power was given by section 18 (xiv) to the Senate to frame Statutes providing either Gujarati or Hindi or both as medium or media of instruction, the power of the University to impose an exclusive medium of its choice was expressly entrusted to the University. But the argument proceeded upon an incorrect reading of the section. The provision does not by itself empower the University to prescribe the use of any exclusive medium of instruction and examination. The University is thereby authorised to confer degrees or academic distinctions upon persons who have pursued approved courses of study and have passed the examination prescribed by the University. Power is also reserved to the University to confer degrees or academic distinctions upon persons who have not pursued the courses prescribed by the University if exemption in that behalf is prescribed by the Statutes, Ordinances or Regulations. The expression "in the manner" prescribed by the Statute, Ordinance or Regulation has no reference to the class of persons who have pursued approved courses of study in the University or in an affiliated college, but qualifies the expression "Unless exempted therefrom" immediately preceding. By the clause the University is authorised to confer degrees, diplomas or distinctions not only upon persons who have pursued the courses of instruction prescribed and have passed the qualifying examination, but upon other persons as well who have not pursued the courses of instruction but have passed the prescribed examination, if exemption in that behalf is given by the Statutes, Ordinances or Regulations. The power under sub-clause (a) of clause (10) does not carry with it the power to impose an exclusive medium such as Gujarati or Hindi. By clause (14) power among others to take measures to ensure that proper standards of instructions, teaching or training are maintained in the affiliated colleges and recognised institutions is granted, and clause (15) invests the University with power to control and co-ordinate the activities of, and give financial aid to affiliated colleges and recognised institutions, but not the power to provide for an exclusive medium as claimed by the University. The Legislature in clause (27) has dealt with the subject of medium of instructions and the other clauses on which reliance is placed do not expressly deal with that topic. It would be difficult then to hold that the Legislature while providing in clause (27) about the medium of instruction was also dealing indirectly with the subject of prescribing an exclusive medium of instruction, when it made provisions relating to instruction, teaching and training in educational institutions or for enabling those institutions to undertake specialised studies or giving guidance

in teaching in colleges, or for providing for degrees or academic distinctions or for taking measures ensuring proper standard of instructions, teaching or training or the conduct of activities.

Clause (27), before it was amended, by Act IV of 1961, ran as follows :—

“ to promote the development of the study of Gujarati and Hindi in Devnagari script and the use of Gujarati or Hindi in Devnagari script or both as a medium of instruction and examination ;

Provided that English may continue to be the medium of instruction and examination in such subjects and for such period not exceeding ten years from the date on which section 3 comes into force as may from time to time be prescribed by the Statutes.”

By the first paragraph of clause (27) power is conferred to promote the development and use of Gujarati or Hindi or both as a medium of instruction. That clause is not in its expression, grammatically accurate. It should, if it had been drafted in strict accordance with the rules of grammar, have stated that the University was invested with power to promote the use of Gujarati or Hindi or both *as a medium or media of instruction* and examination. The use of the expression “ promote ” suggests that power was conferred upon the University to encourage the study of Gujarati and Hindi and their use as media of instruction and examination, it does not imply that power was given to provide for exclusive use of Gujarati or Hindi or both as a medium or media of instruction and examination and that inference is strengthened by the indefinite article “ a ” before the expression “ medium of instruction ”. The use of the expression “ a medium of instruction ” clearly suggests that Gujarati or Hindi was to be one of several media of instruction, and steps were to be taken to encourage the development of Gujarati and Hindi and their use as media of instruction and examination. From the use of the expression “ promote ” read in the context of the indefinite article “ a ” it is abundantly clear that power to impose Gujarati or Hindi as the medium of instruction and examination to the exclusion of other media was not entrusted to the University. It may be noticed that if the expression “ promote the use of Gujarati or Hindi as a medium of instruction and examination ” was intended to mean “ to promote the exclusive use of Hindi or Gujarati ”, a similar interpretation would have to be put on the use of the expression “ to promote the development of Gujarati and Hindi ” thereby ascribing to the Legislature an intention that no other lang ages besides Gujarati and Hindi were to be developed. Use in the proviso of the definite article “ the ” in relation to English as medium of instruction further supports this view. When the Legislature enacted that English was to continue as the medium of instruction and examination in certain subjects it merely provided for continuance of an existing and accepted exclusive medium of instruction. It is common ground that in the University of Bombay the exclusive medium of instruction was English, in the various affiliated colleges in the region or area over which the Gujarat University acquired authority. By the proviso to clause (27) of section 4, in the subjects to be prescribed the medium of instruction was to continue to remain English. By the operative part of clause (27) therefore the Legislature provided that use of Gujarati or Hindi or both as a medium or media of instruction was to be promoted thereby indicating that Gujarati or Hindi or both was or were not to be the exclusive medium or media but to be adopted in addition to the accepted medium, *viz.*, English for instruction and examination, whereas under the proviso in respect of the subjects prescribed, English was to be the only medium for the periods specified. Clause (28) which confers authority upon the University “ to do all acts and things whether incidental to the powers aforesaid or not as may be requisite in order to further the objects of the University and generally to cultivate and promote arts, science and other branches of learning and culture ” confers additional powers which though not necessarily incidental to the powers already conferred by clauses (1) and (27) were intended to be exercised to further the object of the University. But if the object of the University as indicated by clause (27) was not to authorise the imposition of Gujarati or Hindi or both, as an exclusive medium or media it would be straining the language of clause (28) to interpret it as exhibiting an intention.

to confer upon the University by using the somewhat indefinite expression " requisite in order to further the objects " power to provide for such an exclusive medium.

Reliance was also placed upon section 18 (1) (xiv) by counsel for the University in support of the contention that the Senate was bound to make provision relating to the use of Gujarati or Hindi in Devnagari script or both as a medium of instruction and examination. It is true that section 18 (1) deals with powers and duties of the Senate. Phraseology used in the diverse clauses is *prima facie* not susceptible of the meaning that each clause authorises the Senate to exercise the powers of the University and imposes also a concomitant duty. Assuming, however, that the power conferred upon the Senate also carries with it a duty to exercise the power, we do not think that the exercise of power or performance of duty relating to the use of Gujarati or Hindi or both as a medium or media of instruction and examination postulates a duty to make exclusive use of Gujarati or Hindi or both for that purpose. The use of the indefinite article " a " even in this clause clearly indicates that Gujarati or Hindi or both were to be selected out of several media of instruction and examination and not the sole medium. No other clause of sections 18, 20, and 22 relating to the powers and duties of the Senate, the Syndicate and the Academic Council was relied upon and we are unable to find any which invests the University or its organs, such as the Senate, the Syndicate or the Academic Council with power to impose Gujarati or Hindi as an exclusive medium of instruction.

A corporation has ordinarily an implied power to carry out its objects; power to indicate a medium of instruction in affiliated or constituent colleges may therefore be deemed to be vested in a University but the power to indicate a medium of instruction does not carry with it, in the absence of an express provision, power to impose upon the affiliated institutions an exclusive medium of instruction.

Reliance was placed by Counsel for the University upon a letter dated 7th August, 1949 (which is reproduced in the University Commission's Report) addressed by the Government of India to various Universities and Provincial Governments. It was recited in the letter that the Government of India were of the opinion that in the interest of national education it was hoped that Universities and Provincial Governments will take early steps towards the implementation of certain recommendations, *viz* :—

" Item I.—The Government of India requests the University and Provincial Governments to take steps to :—

(a) replace English as the medium of instruction at the University stage, by gradual stages during next five years, and

(b) adopt in its place the language of the State or Province or region as the medium of instruction and examination.

Item II.—Universities are requested to :—

(i) provide for a compulsory test in the Federal language during the first degree course of the University without prejudice to the results of the Degree Examination, and

(ii) provide facilities for the teaching of the Federal language to all students who wish to take it up as optional subject."

Item III.—*

Items IV and V.—*

Item VI.—*

Item VII.—*

The Government of India may have in the year 1948 intended that English should be replaced in gradual stages as the medium of instruction by the language of the State or the Province, or region, but that will not be a ground for interpreting the provisions of the Act in a manner contrary to the intention of the Legislature plainly expressed. This recommendation of the Government of India has been ignored if not by all; by a large majority of Universities. It is also true that in the Statement of Objects and Reasons of the Gujarat University Act, it was stated "....As recommended by the Committee, it is proposed to empower the University to adopt Gujarati or the national language as the medium of instruction except that for the first ten years English may be allowed as the medium of instruction in subjects in which this medium is considered necessary."

But if the Legislature has made no provision in that behalf a mere proposal by the Government, which is incorporated in the Statement of Objects and Reasons will not justify the Court in assuming that the proposal was carried out. Statements of Objects and Reasons of a Statute may and do often furnish valuable historical material in ascertaining the reasons which induced the Legislature to enact a Statute, but in interpreting the Statute they must be ignored. We accordingly agree with the High Court that power to impose Gujarati or Hindi or both as an exclusive medium or media has not been conferred under clause (27) or any other clauses of section 4.

The proviso to clause (27) was amended by Act IV of 1961 and the following proviso was substituted :—

“ Provided that English may continue to be the medium :—

(i) of instruction and examination for such period as may from time to time be prescribed by the Statutes until the end of May, 1966 in respect of such subjects and courses of study as they may be so prescribed,

(ii) of instruction and examination for such period as may from time to time be prescribed by the Statutes until the end of May, 1968 in respect of post-graduate instruction, teaching and training in subjects comprised in Faculties of Agriculture and Technology including Engineering and until the end of May, 1969 in respect of post-graduate instruction, teaching and training in the subjects comprised in the Faculty of Medicine, and

(iii) of examination at two successive examinations in any subjects held next after the period prescribed under clause (i) or as the case may be, the period prescribed under clause (ii) in respect of those candidates who during such period have failed to appear in or pass the respective examination held with English as the medium of examination in the same subjects :

Provided further that nothing in this clause shall affect the use of English as the medium of instruction and examination in respect of English as a subject.”

It is common ground before us that if power to impose Gujarati or Hindi as an exclusive medium, is not conferred by the operative part of clause (27) there is nothing in the proviso which independently conferred such a power upon the University. The proviso merely extends the use of English as the medium of instruction in certain branches beyond the period of ten years originally prescribed. The proviso has however some bearing on the interpretation of clause (27) : in the second proviso the distinction between the definite article “the” preceding “medium of instruction and examination” in so far as it relates to English is further accentuated. The second proviso says—“ Provided further that nothing in this clause shall affect the use of English as the medium of instruction and examination in respect of English as a subject”. When the Legislature intended to provide English as the sole medium of instruction, definite article ‘the’ was used while in other cases, indefinite article ‘a’ was used denoting thereby that the medium would be one out of several. Therefore, neither under the Act as originally framed nor under the Act as amended by Act IV of 1961 was there any power conferred on the University to impose Gujarati or Hindi or both as exclusive medium or media of instruction and examination and if no such power was conferred upon the University, the Senate could not exercise such a power. The Senate is a body acting on behalf of the University and its powers to enact Statutes must lie within the contour of the powers of the University conferred by the Act.

On the view we have expressed, consideration of the question whether the State Government is competent to enact laws imposing Gujarati or Hindi or both as an exclusive medium or media of instruction in the Universities, may appear academic. But we have thought it necessary to consider the question because the High Court has declared certain provisions of Act IV of 1961 relating to medium of instruction as *ultra vires* the State Legislature and on the question which was argued at considerable length we were invited by Counsel for the appellants to express our view for their guidance in any future legislation which may be undertaken.

Power of the Bombay Provincial Legislature to enact the Gujarat University Act was derived from Entry No. 17 of the Government of India Act, 1935, List II of the Seventh Schedule—“ Education including Universities other than those

specified in paragraph 13 of List I". In List I, Item 13 were included the Banaras Hindu University and the Aligarh Muslim University. Therefore, except to the extent expressly limited by Item 17 of List II read with Item 13 of List I, a Provincial Legislature was invested with plenary power to enact legislation in respect of all matters pertaining to education including education at University level. The expression 'education' is of wide import and includes all matters relating to imparting and controlling education; it may therefore have been open to the Provincial Legislature to enact legislation prescribing either a federal or a regional language as an exclusive medium for subjects selected by the University. If by section 4 (27) the power to select the federal or regional language as an exclusive medium of instruction had been entrusted by the Legislature to the University, the validity of the impugned statutes 207, 208 and 209 could not be open to question. But the Legislature did not entrust any power to the University to select Gujarati or Hindi as an exclusive medium of instruction under section 4 (27). By the Constitution a vital change has been made in the pattern of distribution of legislative power relating to education between the Union Parliament and the State Legislatures. By Item No. 11 of List II of the Seventh Schedule to the Constitution, the State Legislature has power to legislate in respect of "education including Universities subject to the provisions of Items 63, 64, 65 and 66 of List I and 25 of List III". Item No. 63 of List I replaces with modification Item No. 13 of List I to the Seventh Schedule of the Government of India Act, 1935. Power to enact legislation with respect to the institutions known at the commencement of the Constitution as the Banaras Hindu University, the Aligarh Muslim University and the Delhi University and other institutions declared by Parliament by laws to be an institution of national importance is thereby granted exclusively to Parliament. Item 64 invests the Parliament with power to legislate in respect of "institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament, by law, to be institutions of national importance". Item 65 vests in the Parliament power to legislate for "Union agencies and institutions for—(a) professional, vocational or technical training, including the training of police officers; or (b) the promotion of special studies or research, or (c) scientific or technical assistance in the investigation or detection of crime". By Item 66 power is entrusted to Parliament to legislate on "co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions. Item 25 of the Concurrent List confers power upon the Union Parliament and the State Legislatures to enact legislation with respect to "vocational and technical training of labour". It is manifest that the extensive power vested in the Provincial Legislatures to legislate with respect to higher, scientific and technical education and vocational and technical training of labour, under the Government of India Act is under the Constitution controlled by the five items in List I and List III mentioned in Item 11 of List II. Items 63 to 66 of List I are carved out of the subject of education and in respect of these items the power to legislate is vested exclusively in the Parliament. Use of the expression "subject to" in Item 11 of List II of the Seventh Schedule clearly indicates that legislation in respect of excluded matters cannot be undertaken by the State Legislatures. In *Hingir-Rampur Coal Company v. State of Orissa*¹ this Court in considering the import of the expression "subject to" used in an entry in List II in relation to an entry in List I observed that to the extent of the restriction imposed by the use of the expression "subject to" in an entry in List II, the power is taken away from the State Legislature. Power of the State to legislate in respect of education including Universities must to the extent to which it is entrusted to the Union Parliament whether such power is exercised or not, be deemed to be restricted. If a subject of legislation is covered by Items 63 to 66 even if it otherwise falls within the larger field of "education including Universities" power to legislate on that subject must lie with the Parliament. The plea raised by Counsel for the University and for the State of Gujarat that legislation prescribing the medium or media in which instruction should be imparted in institutions of higher education

and in other institutions always falls within Item 11 of List II has no force. If it be assumed from the terms of Item 11 of List II that power to legislate in respect of medium of instruction falls only within the competence of the State Legislature and never in the excluded field, even in respect of institutions mentioned in Items 63 to 65, power to legislate on medium of instruction would rest with the State, whereas legislation in other respects for excluded subjects would fall within the competence of the Union Parliament. Such an interpretation would lead to the somewhat startling result that even in respect of national institutions or Universities of national importance, power to legislate on the medium of instruction would vest in the Legislature of the States within which they are situate, even though the State Legislature would have no other power in respect of those institutions. Item 11 of List II and Item 66 of List I must be harmoniously construed. The two entries undoubtedly overlap : but to the extent of overlapping, the power conferred by Item 66, List I must prevail over the power of the State under Item 11 of List II. It is manifest that the excluded heads deal primarily with education in institutions of national or special importance and institutions of higher education including research, sciences, technology and vocational training of labour. The power to legislate in respect of primary or secondary education is exclusively vested in the States by Item No. 11 of List II, and power to legislate on medium of instruction in institutions of primary or secondary education must therefore rest with the State Legislatures. Power to legislate in respect of medium of instruction is, however, not a distinct legislative head ; it resides with the State Legislatures in which the power to legislate on education is vested, unless it is taken away by necessary intendment to the contrary. Under Items 63 to 65 the power to legislate in respect of medium of instruction having regard to the width of those items, must be deemed to vest in the Union. Power to legislate in respect of medium of instruction, in so far it has a direct bearing and impact upon the legislative head of co-ordination and determination of standards in institutions of higher education or research and scientific and technical institutions, must also be deemed by Item 66, List I to be vested in the Union.

The State has the power to prescribe the syllabi and courses of study in the institutions named in Entry 66 (but not falling within Entries 63 to 65) and as an incident thereof it has the power to indicate the medium in which instruction should be imparted. But the Union Parliament has an overriding legislative power to ensure that the syllabi and course of study prescribed and the medium selected do not impair standards of education or render the co-ordination of such standards either on an all India or other basis impossible or even difficult. Thus though the powers of the Union and of the State are in the Exclusive Lists, a degree of overlapping is inevitable. It is not possible to lay down any general test which would afford a solution for every question which might arise on this head. On the one hand it is certainly within the province of the State Legislature to prescribe syllabi and courses of study and, of course, to indicate the medium or media of instruction. On the other hand it is also within the power of the Union to legislate in respect of media of instruction so as to ensure co-ordination and determination of standards, that is to ensure maintenance or improvement of standards. The fact that the Union has not legislated, or refrained from legislating to the full extent of its powers does not invest the State with the power to legislate in respect of a matter assigned by the Constitution to the Union. It does not, however, follow that even within the permitted relative fields there might not be legislative provisions in enactments made each in pursuance of separate exclusive and distinct powers which may conflict. Then would arise the question of repugnancy and paramountcy which may have to be resolved on the application of the "doctrine of pith and substance" of the impugned enactment. The validity of the State legislation on University education and as regards the education in technical and scientific institutions not falling within Entry 64 of List I would have to be judged having regard to whether it impinges on the field reserved for the Union under Entry 66. In other words the validity of State legislation would depend upon whether it prejudicially affects co-ordination and determination of standards, but not upon the existence of some definite Union

legislation directed to achieve that purpose. If there be Union legislation in respect of co-ordination and determination of standards, that would have paramountcy over the State law by virtue of the first part of Article 254 (1); even if that power be not exercised by the Union Parliament the relevant legislative entries being in the Exclusive Lists, a State law trenching upon the Union field would still be invalid.

Counsel for the University submitted that the power conferred by Item No. 66 of List I is merely a power to co-ordinate and to determine standards, *i.e.* it is a power merely to evaluate and fix standards of education, because, the expression "co-ordination" merely means evaluation, and "determination" means fixation. Parliament has therefore power to legislate only for the purpose of evaluation and fixation of standards in institutions referred to in Item 66. In the course of the argument, however, it was somewhat reluctantly admitted that steps to remove disparities which have actually resulted from the adoption of a regional medium and the falling of standards may be undertaken and legislation for equalising standards in higher education may be enacted by the Union Parliament. We are unable to agree with this contention for several reasons. Item No. 66 is a legislative head and in interpreting it, unless it is expressly or of necessity found conditioned by the words used therein, a narrow or restricted interpretation will not be put upon the generality of the words. Power to legislate on a subject should normally be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in that subject. Again there is nothing either in Item 66 or elsewhere in the Constitution which supports the submission that the expression "co-ordination" must mean in the context in which it is used merely evaluation, co-ordination in its normal connotation means harmonising or bringing into proper relation in which all the things co-ordinated participate in a common pattern of action. The power to co-ordinate, therefore, is not merely power to evaluate, it is a power to harmonise or secure relationship for concerted action. The power conferred by Item 66, List I is not conditioned by the existence of a state of emergency or unequal standards calling for the exercise of the power.

There is nothing in the entry which indicates that the power to legislate on co-ordination of standards in institutions of higher education, does not include the power to legislate for preventing the occurrence of or for removal of disparities in standards. This power is not conditioned to be exercised merely upon the existence of a condition of disparity nor is it a power merely to evaluate standards but not to take steps to rectify or to prevent disparity. By express pronouncement of the Constitution makers it is a power to co-ordinate, and of necessity, implied therein is the power to prevent what would make co-ordination, impossible or difficult. The power is absolute and unconditional, and in the absence of any controlling reasons it must be given full effect according to its plain and expressed intention. It is true that "medium of instruction" is not an item in the legislative list. It falls within Item No. 11 as a necessary incident of the power to legislate on education: it also falls within Items 63 to 66. In so far as it is a necessary incident of the powers under Item 66, List I it must be deemed to be included in that item and therefore excluded from Item 11, List II. How far State legislation relating to medium of instruction in institutions has impact upon co-ordination of higher education is a matter which is not susceptible, in the absence of any concrete challenge to a specific statute, of a categorical answer. Manifestly, in imparting instructions in certain subjects, medium may have subordinate importance and little bearing on standards of education while in certain others its importance will be vital. Normally in imparting scientific or technical instructions or in training students for professional courses like law, engineering, medicine and the like existence of adequate text-books at a given time, the existence of journals and other literature, availability of competent instructors and the capacity of students to understand instructions imparted through the medium in which it is imparted are matters which have an

important bearing on the effectiveness of instruction and resultant standards achieved thereby. If adequate text-books are not available or competent instructors in the medium, through which instruction is directed to be imparted are not available, or the students are not able to receive or imbibe instructions through the medium in which it is imparted, standards must of necessity fall, and legislation for co-ordination of standards in such matters would include legislation relating to medium of instruction.

If legislation relating to imposition of an exclusive medium of instruction in a regional language or in Hindi, having regard to the absence of text-books and journals, competent teachers and incapacity of the students to understand the subjects, is likely to result in the lowering of standards, that legislation would, in our judgment, necessarily fall within Item 66 of List I and would be deemed to be excluded to that extent from the amplitude of the power conferred by Item No. 11 of List II.

It must be observed, that these observations have been made by us on certain abstract considerations which have been placed before us. We have no specific statute the validity of which, apart from the one which we will presently mention, is challenged.

Counsel for the State and the University invited us to express our opinion on the question whether legislation which the State may undertake with a view to rectify the deficiency pointed out by us in interpreting section 4 (27), would be within the competence of the State Legislature. What shape such legislation may take is for the State to decide. We have, however, proceeded somewhat broadly to deal with what we conceive is the true effect of Item 66 in List I in its relation to Item 11 in the List II in so far as the two items deal with the power of the Parliament and the State Legislature to enact laws in respect of medium of instruction.

We are unable, however, to agree with the High Court that Act IV of 1961 in so far as it amended the proviso to section 4 (27) is invalid, because it is beyond the competence of the State Legislature. By the amendment of the proviso to section 4 (27), the Legislature purported to continue the use of English as the medium of instruction in subjects selected by the Senate beyond a period of ten years prescribed by the Gujarat University Act, 1949. Before the date on which the parent Act was enacted, English was the traditional medium of instruction in respect of all subjects at the University level. By enacting the proviso as it originally stood, the University was authorised to continue the use of English as an exclusive medium of instruction in respect of certain subjects to be selected by the Senate. By the amendment it is common ground that no power to provide an exclusive medium other than the pre-existing medium is granted. Manifestly, imparting instruction through a common medium which was before the Act the only medium of instruction all over the country, cannot by itself result in lowering standards and co-ordination and determination of standards cannot be affected thereby. By extending the provisions relating to imparting of instruction for a period longer than ten years through the medium of English in the subjects selected by the University, no attempt was made to encroach upon the powers of the Union under Item No. 66, List I. If the University have no power to prescribe an exclusive medium, the enactment of section 38-A which prescribes penalties for failing to carry out directions relating to the media of instruction will doubtless be not invalid.

The order of the High Court relating to the invalidity of the Statutes 207 and 209 of the University in so far as they purport to impose "Gujarati or Hindi or both as exclusive medium" of instruction, and the circulars enforcing those Statutes must therefore be confirmed.

We do not express any opinion on the alleged infringement of fundamental rights of the petitioner under Articles 29 (1) and 30 (1) of the Constitution. We set aside the order of the High Court in so far as it declares section 4, clause (27), proviso and section 38-A invalid. This will be, however, subject to the interpretation placed by us upon the relevant provisions, and the power of the State Legislature to

impose Gujarati or Hindi or both as exclusive medium or media for instructions in the affiliated and constituent colleges.

The appellants will pay the costs of the respondents in the two appeals. One hearing fee.

Subba Rao, J.—With the greatest respect, I cannot agree. The facts have been fully stated in the judgment of my learned brother, Shah, J., and I need not restate them. Two questions arise for consideration, namely, (1) whether the State Legislature has the constitutional competence to make a law prescribing an exclusive medium of instruction in the affiliated colleges, and (2) whether under the Gujarat University Act, as amended by Act IV of 1961, the said University has the power to prescribe an exclusive medium of instruction.

The first question may be elaborated thus : Is the State Legislature competent to make a law under Entry 11 of List II of the Seventh Schedule to the Constitution prescribing an exclusive medium of instruction in the affiliated colleges of the University? To put it in other words, can a State law enable a University to prohibit, expressly or by necessary implication, any media of instruction other than those prescribed by it? Learned Counsel appearing for the University of Gujarat and for the State of Gujarat, contend that the State Legislature has such a power under Entry 11 of List II of the Seventh Schedule to the Constitution, whereas learned Counsel for the respondents, while conceding that a State Legislature has the power to empower a University to prescribe a medium of instruction, broadly contend that a State law which prohibits the use of a medium of instruction, such as English, which is traditionally the exclusive current medium of instruction in the Universities of this country, and directs the use of a regional language as the sole medium or as an additional medium of instruction, along with other Indian languages, impinges directly on Entry 66 of List I of the Seventh Schedule to the Constitution, since, it is said, the fixation of standard and co-ordination on all-India basis is rendered difficult, if not made impossible, by such a State law.

Before I consider the impact of Entry 66 of List I, on Entry 11 of List II, it would be convenient to notice briefly the relevant principles of construction. Learned Counsel for the respondents contend that the principle of pith and substance has no relevance to a case where one entry is made subject to another entry; if out of the scope of one entry, the argument proceeds, a field of legislation covered by another entry is carved out, there is no scope for overlapping and, therefore, there is no occasion for invoking the principle of pith and substance in the matter of interpreting the said entries; to meet such a situation, his further argument is, the Courts have evolved another principle of "direct impact", i.e., if a State law has a "direct impact" on an entry in the Union List, the said law falls outside the scope of the State entry. Let us see whether there is any such independent doctrine of construction in decided cases or in principle. The Judicial Committee, in *Prafulla Kumar v. Bank of Commerce, Khulna*¹, had invoked the principle of "pith and substance" to ascertain whether the Bengal Money-lenders Act (X of 1940) was *ultra vires* the Provincial Legislature. There, the conflict was between Items 28 and 38 of List I of the Seventh Schedule to the Government of India Act, 1935, namely, promissory notes and banking, and Item 27 of List II thereof, namely, money-lending. The Judicial Committee held that the pith and substance of the Act being money-lending, it came under Item 27 of List II and was not rendered invalid because it incidentally trenching upon matters reserved to the Federal Legislature, namely, promissory notes and banking. At page 65 of the report the following instructive passage appears :

"But the overlapping of subject-matter is not avoided by substituting three lists for two or even by arranging for a hierarchy of jurisdictions.

Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found."

Then their Lordships proceeded to state :

"Thirdly, the extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking?"

It is clear from the said passage that the degree of invasion of a law made by virtue of an entry in one List into the field of an entry in another List is not governed by a separate doctrine but is only a circumstance relevant for ascertaining the pith and substance of an impugned Act. This Court, in *The State of Bombay v. F.N. Balsara*¹, has accepted that principle. There, the constitutional validity of the Bombay Prohibition Act (XXV of 1949) was in issue. The question was whether that Act fell under Entry 31 of List II of the Seventh Schedule to the Government of India Act, 1935, namely, "intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors", or under Entry 19 of List, I, namely, import and export across customs frontier, which is a dominion subject. This Court held that the pith and substance of the Act fell under the former entry and not under the latter, though the Act incidentally encroached upon the Dominion field of legislation. It was argued, *inter alia*, that prohibition of purchase, use, transport and sale of liquor would affect the import. The argument was advanced as part of the doctrine of pith and substance and was rejected on the ground that the said encroachment did not affect the true nature and character of the legislation. This Court again had to deal with the *vires* of the provisions of the Madras Prohibition Act in *A.S. Krishna v. The State of Madras*². There, the argument was that the said provisions were repugnant to the provisions of the existing Indian laws with respect to the same matter, to wit, Indian Evidence Act I of 1872 and Criminal Procedure Code (Act V of 1898). In that context the argument based upon impact of the former legislation on the latter was advanced. This Court rejecting the contention observed :—

"That is to say, if a statute is found in substance to relate to a topic within the competence of the Legislature, it should be held to be *intra vires*, even though it might incidentally trench on topics not within its legislative competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable, that is, whether in the guise of making a law on a matter within its competence, the Legislature is, in truth, making a law on a subject beyond its competence. But where that is not the position, then the fact of encroachment does not affect the *vires* of the law even as regards the area of encroachment."

But it is said that the separate existence of the doctrine of "direct impact" was conceded in *Union Colliery Company of British Columbia, Ltd. v. Bryden*³. There the question was whether section 4 of the British Columbia Coal Mines Regulation Act, 1890, which prohibited Chinamen of full age from employment in underground coal workings, was in that respect *ultra vires* of the Provincial Legislature inasmuch as the subject of "naturalization and aliens" was within the exclusive authority of the Dominion Parliament conferred under section 91, sub-section (25) of the British North America Act, 1867. On a consideration of the material factors and on a construction of the relevant provisions, the Judicial Committee observed:

"But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work in underground coal mines within the Province of British Columbia."

After arriving at that finding, their Lordships proceeded to say :

"Their Lordships see no reason to doubt that, by virtue of section 91, sub-section (25), the Legislature of the Dominion is invested with exclusive authority in all matters which directly concern the

1. (1951) S.C.J. 478 : (1951) 2 M.L.J. 141 : (1951) S.C.R. 682.

2. (1957) S.C.J. 216 : (1957) M.L.J. (Cr.) 82 : (1957) 1 M.L.J. (S.C.) 59 : (1957) 1 An.W.R.

(S.C.) 59 : (1957) S.C.R. 399, 406 : A.I.R. 1957 S.C. 297.

3. L.R. (1899) A.C. 580, 587.

rights, privileges, and disabilities of the class of Chinamen who are resident in the Provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of section 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada."

This passage indicates that the Judicial Committee found that, in pith and substance, the impugned law affected the rights and privileges of Chinamen which subjects was within the exclusive authority of the Parliament of Canada. This judgment only reiterates the principle of pith and substance; and it does not in any way countenance a new principle of "direct impact" outside the scope of the said doctrine. In *Bank of Toronto v. Lambe*¹, the Quebec Act was attacked on two grounds, first that the tax was not "taxation within the Province" and secondly, that the tax was not a "direct tax." The Judicial Committee held that the Act was within the legislative competence of the Province. It was observed therein:

"If (the Judges) find that on the due construction of the Act a legislative power falls within section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament."

The argument of anticipatory encroachment was rejected. This case was considered and distinguished in *Attorney-General for Alberta v. Attorney-General for Canada*². There, the Province of Alberta passed an Act respecting "the taxation of Bank", imposing on every corporation or joint stock company, other than the Bank of Canada, incorporated for the purpose of doing banking or savings bank business in the Province, an annual tax, in addition to any tax payable under any other Act, of (a) $\frac{1}{2}$ per cent. on the paid-up capital, and (b) 1 per cent. on the reserve fund and undivided profits. The Board held that the proposed taxation was not in any true sense taxation "in order to the raising of a revenue for Provincial purposes" so as to be within the exclusive legislative competence of the Provincial Legislature under section 92 (2) of the British North America Act but was merely part of a legislative plan to prevent the operation within the Province of those banking institutions which had been called into existence and given the necessary powers there to conduct their business by the only proper authority, the Parliament of the Dominion, under section 91 of the British North America Act. The Board in effect, therefore held that the Provincial Act, though couched as a taxation measure, was a colourable attempt to prevent the functioning of the banking institutions the regulation whereof was the Dominion subject. The pith and substance of the statute was not direct taxation or taxation within the Province within the meaning of section 92 of the British North America Act, but was one that fell under the Dominion subject of "banking". The reason for this conclusion is found at page 133 and it is as follows:

"Their Lordships agree with the opinion expressed by Kerwin, J. (concurring in by Crocket, J.) that there is no escape from the conclusion that, instead of being in any true sense taxation in order to the raising of a revenue for Provincial purposes, the Bill No. 1 is merely part of a legislative plan to prevent the operation within the Province of those banking institutions which have been called into existence and given the necessary powers to conduct their business by the only proper authority, the Parliament of Canada."

That is to say the constitutional validity of the Bill was sustained on the ground that it was a colourable piece of legislation in respect of a subject which in substance was within the Dominion field. The Judicial Committee in coming to the conclusion laid down the rules of guidance for ascertaining the true nature of a legislation. Their Lordships premised their discussion with the following statement:

"..... It is well established that if a given subject-matter falls within any class of subjects enumerated in section 91, it cannot be treated as covered by any of those within section 92."

And to ascertain whether a particular subject-matter falls in one class or other their Lordships laid down the following rules of guidance:

(1) "It is therefore necessary to compare the two complete lists of categories with a view to ascertaining whether the legislation in question fairly considered, falls *prima facie* within section 91 rather than within section 92".

(2) "The next step in a case of difficulty will be to examine the effect of the legislation."

(3) "The object or purpose of the Act in question."

It will, therefore, be seen that the Judicial Committee did not lay down any new principle of "direct impact" *de hors* the doctrine of pith and substance. The heavy, impact and crippling effect of an impugned legislation on a Dominion subject was taken as an important indication of its colourable nature. The foregoing discussion does not countenance the suggestion that apart from the doctrine of pith and substance, the Courts have recognized an independent principle of "direct impact."

Not can I agree with the argument of learned Counsel that the doctrine of pith and substance has no application in a case where one entry in a list is expressly made subject to another entry in a different list. In such a case it only means that out of the scope of the former entry a field of legislation has been carved out and put in the latter entry. That in itself has no bearing on the applicability or otherwise of the doctrine. The position is exactly the same as in the matter of construing two entries in different lists. Whether two entries are carved out of one subject or deal with two different subjects the principle of construction must be the same: in either case the Court is called upon to ascertain under what entry the impugned law falls. The doctrine of pith and substance only means that if on an examination of a statute it is found that the legislation is in substance one on a matter assigned to the Legislature then it must be held to be valid in its entirety, even though it may trench upon matters which are beyond its comprehension: see *The State of Bombay v. F.N. Batara*¹ and *A.S. Krishna v. The State of Madras*². The true character of the legislation is the criterion and its incidental encroachment on either items is not material. If that be so, once we come to the conclusion that the impugned legislation squarely falls within one entry, its incidental encroachment on another entry whether carved out of the former entry or has an independent existence allthrough, will not make it any the less one made within the limits of the former entry.

To summarize: When a question arises under what entry an impugned legislation falls, the Court directs its mind to ascertain the scope and effect of the legislation and its pith and substance. Decided cases afford many criteria to ascertain its scope namely comparison of conflicting entries effect of the impugned legislation, its object and purpose its legislative history, its colourable nature and similar others—all or some of them would be useful guides to get at the core of the legislation. But no authority has gone so far as to hold that even if the pith and substance of an Act falls squarely within the ambit of a particular entry, it should be struck down on the speculative and anticipatory ground that it may come into conflict with a law made by a co-ordinate Legislature by virtue of another entry. If the impact of a State law on a Central subject is so heavy and devastating as to wipe out or appreciably abridge the Central field then it may be a ground for holding that the State law is a colourable exercise of power and that in pith and substance it falls not under the State entry but under the Union entry. The case law, therefore, does not warrant the acceptance of a new doctrine *de hors* that of pith and substance.

In this context it will be useful to notice some of the well-settled rules of interpretation laid down by the Federal Court and accepted by this Court in the matter of construing the entries. In *Calcutta Gas Company v. The State of West Bengal*³ it is observed:

"The power to legislate is given to the appropriate Legislatures by Article 246 of the Constitution. The entries in the three Lists are only legislative heads or fields of legislation: they demarcate the area over which the appropriate Legislature can operate. It is also well-settled that widest amplitude should be given to the language of the entries. But some of the entries in the different Lists or in the same List may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about harmony between them....."

1. (1951) S.C.J. 478: (1951) 2 M.L.J. 141 : (S.C.) 59: (1957) S.C.R. 593, 406 : A.I.R. 1957 (1951) S.C.R. 682. S.C. 297.

2. (1957) S.C.J. 216 : (1957) M.L.J. (Cri.) 3. (1963) 1 S.C.J. 106 : A.I.R. 1962 S.C. 1044, 1049.
3. (1957) 1 M.L.J. (S.C.) 59 : (1959) 1 An. W.R.

It may, therefore, be taken as a well-settled rule of construction that every attempt should be made to harmonize the apparently conflicting entries not only of different Lists but also of the same List and to reject that construction which will rob one of the entries of its entire content and make it nugatory."

With this background let me look at the two entries, namely, Entry 11 of List II and Entry 66 of List I. The said Entries read:

Entry 11 of List II. Education including Universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III.

Entry 66 of List I. Co-ordination and determination of standards in institutions for higher education or research and scientific and technological institutions.

We are not concerned with the question of medium of instruction in regard to that part which has been specially carved out and included in Entries 63, 64 and 65 of List I. The entire field of education including Universities, subject to the exceptions mentioned in Entry 11 of List II, is entrusted to the State Legislature. There cannot be education except through a medium or media of instruction. Education can be imparted only through a medium. To separate them is to destroy the concept: It is inconceivable that any reasonable body of Constitution-makers would entrust the subject of medium of instructions to Parliament and education *de hors* medium to a State: it is like cutting away the hand that feeds the mouth. That no such separation was made in the case of elementary and secondary education is conceded. It cannot also be doubted that medium of instruction is also included in Entry 63 of List I relating to the specified Universities. If so much is conceded what is the reason for excluding it from the University education in Entry 11 of List II. There is none. Conversely, the express terms of Entry 66 of List I does not *prima facie* take in the subject of medium of instruction. The phraseology is rather wide but none the less clear. Let me look at the two crucial expressions "co-ordination" and "determination of standards." The contention of learned Counsel for the appellant that the composite term means fixing of standards for the purpose of correlation and equating them if they vary, appears to be plausible, but is rather too restrictive and if accepted makes the role of Parliament that of a disinterested spectator. It must be more purposive and effective. The interpretation sought to be put upon it by learned Counsel for the respondents, namely, that under certain circumstances the Parliament can make a law displacing the medium of instruction prescribed by the State law by another of its choice, cuts so deeply into the State Entry that it cannot be countenanced unless the Entry in List I is clear and unambiguous. "To determine" is "to settle or decide or fix". The expression "co-ordination" is given the following meanings, among others in the dictionary: "to place in the same order rank or division to place in proper position relatively to each other and to the system of which they form parts: to act in combined order for the production of a particular result." That entry enables Parliament to make a law for fixing the standards in institutions for higher education for the purpose of harmonious co-ordination of the said institutions for the achievement of the desired result, namely, the improvement of higher education. The expression "co-ordination and determination of standards" is a composite term and the fixing up of standards for the purpose of co-ordination does not necessarily involve a particular medium of instruction. To illustrate: education cannot be imparted effectively without books, professors, students, equipment, buildings, finance, proper medium of instruction, etc. All the said matters admittedly are comprehended by the word "education", for they are the necessary concomitants of education. It would be unreasonable to hold that all the said matters fall under the heading "co-ordination and determination of standards" for if it was so held, the entry "education" would be robbed of its entire content. In such a case the principle of harmonious construction should be invoked and a demarcating line drawn; the clue for drawing such a line is found in the word "co-ordination." So understood the State can make a law for imparting education and for maintaining its standards; whereas Parliament can step in only to improve the said standards for the purpose of co-ordination. The standards of some

Universities may fall because of the deficiency in any of the aforesaid things. Parliament may make a law providing for facilities in respect of any or all the aforesaid matters so that the backward universities may pick up and come to the level of other advanced Universities. It may also make a law for raising the general standards of all the Universities. The law made by Parliament may determine the general standards in respect of the said and similar matters and provide the necessary financial and other help to enable the Universities to reach the level prescribed. It may also be that the said law may provide for a machinery to enrich the language adopted as a medium of instruction by a particular university so that it may become a useful vehicle for higher education and for technological and scientific studies. If the pith and substance of the law is "co-ordination and determination of standards" its incidental encroachment on the medium of instruction for the purpose of enriching it may probably be sustained. But in the name of co-ordination it cannot displace the medium of instruction, for, in that event, the encroachment on the subject of education is not incidental but direct. For the said entry does not permit the making of any law which allows direct interference by an outside body with the course of education in any university, but enables it generally to prescribe standards and give adventitious aids for reaching the said standards. In short, the role of a guardian angel is allotted to Parliament so that it can make a law providing a machinery to watch, advise and give financial and other help, so that the Universities may perform their allotted role. The University Commission Act was passed in the implementation of such a role. So understood there cannot be any possible dichotomy between the two entries.

The scheme of the Constitution also negatives the idea of legislation by Parliament in respect of medium of instruction. When the Constitution was passed, there were many fairly well-developed languages in different parts of our country and they were mentioned in the Eighth Schedule to the Constitution. At that time, English was the medium of instruction at all levels and was also the official language of the administration. It was accepted on all hands that English should be replaced at all levels, but the process should be phased. Article 343 of the Constitution declares that the official language of the Union shall be Hindi in Devanagari script and it permits the use of English for all official purposes for a specified period. But in the case of education no such go-slow process was indicated, presumably, because it was left to the wisdom of the Legislatures of States and educationists to work out the programme for smooth transition. But the insistence on the replacement of English by Hindi for all official purposes, the recognition of regional languages, the omission of English in the Eighth Schedule, the direction under Article 351 that Hindi should be enriched by a process of assimilation from the languages specified in the Eighth Schedule and from Hindustani, all indicate that the makers of the Constitution were confident that the regional languages were rich or at any rate resilient enough to be or to become convenient vehicles of instruction at all levels of education. That is why no express reservation was made for replacing English by regional languages by convenient stages. It may, therefore, be accepted that the makers of the Constitution thought that the specified regional languages would be suitable vehicles of instruction, though it may equally be conceded that they require to be enriched to meet the demands of higher education. In this context Entry 66 of List I must be construed on the assumption that the regional languages would be the media of instruction in all the universities, and if so construed the law fixing the standards for co-ordination cannot displace the medium of instruction.

Let me now look at it from a different angle. It is contended that English is the established medium of instruction throughout the country, that following the example of the Gujarat University other universities might follow suit, that consequently there would be a steep fall in the standards of higher education, and that if the argument of the appellant was accepted, Parliament would be a helpless spectator witnessing the debacle. In effect, on the appellant's construction, the major part of the field of co-ordination would be wiped out. This in effect was the argument of learned

Counsel for the respondents though couched in different phraseology. This is another way of saying that the pith and substance of such legislation made by a State prohibiting the use of English falls not under the subject of "education" but under the entry "co-ordination". This argument, though appears to be attractive, is without legal or factual basis. If the pith and substance of the impugned law is covered by the entry "education", the question of effacing the Union entry does not arise at all. It is an argument of policy rather than a legal construction. The simple answer is that the Constituent-Assembly did not think fit to entrust the subject of medium of instruction to Parliament, but relied upon the wisdom of the Legislatures to rise to the occasion, and enact suitable legislation. Factually, except in Gujarat, where the Legislature introduced Gujarati as the exclusive medium of instruction by an accelerated process all other States are adopting a go-slow policy. Though that circumstance in my view, has no relevance in construing the relevant provisions of the Constitution there is no immediate danger of all the other States abolishing English as an additional medium of instruction. I would prefer to accept the natural meaning of the word "education" than to stretch the expression "co-ordination" to meet a possible emergency when all the States, following a policy adopted by a State might set their face against English. That apart, the picture drawn by learned Counsel is rather extravagant. It presupposes that but for the continuance of English as one of the media of instruction, education is bound to fall in standards and co-ordination may become impossible. But our Constitution-makers did not think so, and they did not provide for the continuance of English in the Universities. Further, the standards can be maintained, perhaps with some trouble and expense, by imparting education through other media of instruction, provided the languages are suitably enriched. The State Legislatures, and more so the universities, can be relied upon to make every reasonable attempt to maintain the standards. It cannot be assumed that the State Legislatures would function against the best interests of University education, while Parliament can safely be relied upon to act always in its interest. All the legislative bodies under our Constitution are elected on adult franchise and this Court rightly presumes that they act with wisdom and in the interests of the people they represent. If the Legislature of a State could in a particular instance act precipitately by replacing English by a regional language, Parliament also in its wisdom, if it has power to do so, may cut the Gordian-knot by replacing English by Hindi in all the Universities. It is after all a constitutional choice of institutions to implement a particular purpose and it is therefore the duty of this Court to interpret the provisions of the Constitution uninfluenced by ephemeral local conditions and situations. I would, therefore, hold that Entry 11 of List II takes in the medium of instruction and that it is not comprehended by the phraseology of Entry 66 of List I of the Seventh Schedule to the Constitution. It follows that the State Legislature can make a law empowering the University to prescribe a regional language as the exclusive medium of instruction.

The next question is whether under the provisions of the Gujarat University Act, 1949, hereinafter called the Act, the University has the power to prescribe a language as the exclusive medium of instruction; or to state it differently, whether the University had power to prohibit, expressly or by necessary implication, the use of any language other than that prescribed as the medium of instruction.

At the outset it would be convenient to notice briefly the scheme of the Act so that the relevant provisions may be construed in their proper setting. Under the Act, the Chancellor and the Vice-Chancellor of the University, and the members of the Senate, the Syndicate and the Academic Council of the University constitute a body corporate by the name of "The Gujarat University". It is a teaching and affiliating University. It has *inter alia* powers to provide for instruction, teaching and training in different branches of learning and courses of study; to hold examinations and confer degrees; to control and co-ordinate the activities of various institutions connected with the University; and to do all acts and things incidental to the said powers. The said purposes are carried out through three instrumentalities, namely, the Senate, the legislative body, the Syndicate, the executive, and the

Academic Council, which is responsible for the maintenance of standards in the examinations of the University. The Chancellor is the head of the University. The Senate passes Statutes; the Syndicate, Ordinances; and the Academic Council, the regulations—all providing for the subjects entrusted to them respectively. The Chancellor and the State Government have the power of inspection over the affairs of the University and of giving necessary instructions. Briefly stated, the University is a corporate body with a large degree of autonomy, forming an institution for the promotion of education in the higher branches of learning. It has power to confer degrees and other privileges on the successful alumni of the institutions under its control.

With this background let me look at the relevant provisions of the Act. Clause (1) of section 4 empowers the University to provide for instruction, teaching and training in such branches of learning courses of study as it may think fit and to make provisions for research and dissemination of knowledge; clause (7) thereof, to lay down the courses of instruction for various examinations; clause (8), to guide the teaching in colleges or recognised institutions; clause (10), to hold examinations and confer degrees, titles, diplomas and other academic distinctions; clause (14), to inspect colleges and recognized institutions and to take measures to ensure that proper standards of instructions, teaching or training are maintained in them; clause (15), to control and co-ordinate the activities of, and to give financial aid to affiliated colleges and recognized institutions; and clause (28), to do all such acts and things whether incidental to the powers aforesaid or not as may be requisite in order to further the objects of the University and generally to cultivate and promote arts, science and other branches of learning and culture. Apart from the incidental powers expressly conferred by clause (28), it is well-settled that a corporation can also exercise powers incidental to or consequential upon those expressly conferred on it. The legal position has been neatly brought out by Viscount Cave, L.C. in *Deucher v. Gas Light & Coke Company*¹, by placing two passages of earlier decisions in juxtaposition thus:

"Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions." "I must stop there. To that statement I may add a sentence from the speech of Lord Selborne in the case of *Attorney-General v. Great Eastern Ry. Co.*², where he said this: "I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*."

When an Act confers a power on a corporation it impliedly also grants the power of doing all acts which are essentially necessary for exercising the same.

Bearing the aforesaid principles in mind, I must ask the question whether on a fair reading of the aforesaid provisions it can be said that the University has the implied power to prescribe an exclusive medium of instruction. If once I reach the conclusion, namely, that such a power is necessary for carrying out the purposes expressly authorised by the statute, I must hold that the said power is not beyond the competency of the University. The University has to provide for instruction, teaching and training in different branches of learning and courses of study, to lay down the courses of instructions for various examinations and to guide the teaching in colleges or recognized institutions. The power to prescribe a medium of instruction is implicit in the power to provide for instruction and the power to guide the teaching. One can only instruct through a medium. It is impossible to conceive of instruction without a medium. Indeed, they are parts of the same process. A University cannot make a provision for instruction or teaching without at the same time prescribing a medium or media for teaching it. If it can fix two media,

1. L.R. (1925) A.C. 691, 695.

2. (1880) L.R. 5 A.C. 473, 478.

it can equally prescribe a sole medium if it thinks that for the proper instruction a particular language is the most suitable medium. A perusal of the earlier Bombay statutes and similar statutes of other Universities of this country indicates that the said Universities prescribed the English medium only in exercise of similar powers conferred on them. If this fundamental power to prescribe the medium is denied to the Universities, the substratum of their autonomy and utility under the Act will largely be jeopardized or affected. To illustrate there may be 20 colleges affiliated to a University; if the University cannot prescribe a sole medium of instruction for all the affiliated colleges, each one of them may adopt a different language as its medium, with the result that there will be chaos in the sphere of higher education. If such a power does not exist, how is it possible for a University to hold examinations in a particular medium? It will be forced to hold examinations in all the different languages chosen by the affiliated colleges. Though the statute confers a plenary power on the University to hold examinations and confer degrees, it will not have the power, if the construction suggested by learned Counsel for the respondents be adopted, to hold examinations in the language chosen by it. But it is suggested that though it has such a power, it must exercise it reasonably so as to satisfy the needs of the different colleges affiliated to it. I do not see how, if the University has the power to hold examinations in one language the exercise of that power could become unreasonable if affiliated colleges chose to ply their own course in utter disregard of the opinion of the University. Be that as it may I have no hesitation in holding that the University has the implied power to prescribe for the purposes of higher education a number of media of instructions or even a sole medium of instruction to the exclusion of others.

It is then said that clause (27) confers an express power on the University to prescribe a medium of instruction and, therefore, whatever implied power it may have in its absence it can no longer be exercised under the Act. As much of the argument turned upon the construction of this clause, it would be convenient to read it :

Clause (27) : (The University shall have the power) to promote the development of the study of Gujarati and Hindi in Devanagari script and the use of Gujarati or Hindi in Devnagari script or both as a medium of instruction and examination :

Provided that English may continue to be the medium—

(i) of instruction and examination for such period as may from time to time be prescribed by the Statutes until the end of May, 1966 in respect of such subjects and courses of study as may be so prescribed.

* * * * *

It is said that this being the express power conferred upon the University in regard to the prescribing of a medium of instruction, it can only exercise the said power within the four corners of the said clause, and that under that clause the University can only provide for Gujarati or Hindi or both of them in addition to other medium or media of instructions. To put it in other words, the argument is that the University has no power to provide for an exclusive medium of instruction, but it can only prescribe the said languages as additional media. This argument is sought to be reinforced by a comparison of the indefinite article used in the substantive part of the clause and the definite article used in the proviso thereto. While the substantive part of the clause says that the University has the power to promote the development of the study of Gujarati and Hindi in Devanagari script and the use of Gujarati or Hindi in Devanagari script or both as a medium of instruction and examination, the proviso says that English may continue to be the medium of instruction and examination. The use of the indefinite article "a" in the substantive part of the clause in contradistinction to the definite article "the" used in the proviso, the argument proceeds, is decisive of the question that the University has no power to prescribe Gujarati or Hindi as the medium i.e., the exclusive medium, of instruction in the University. I do not find any merits in this argument; Clause (27) does not exhaust the power of the University to provide for a medium; that power is implicit in clause (1) of section 4 and other clauses thereof already

mentioned. Clause (27) confers an additional power on the University to promote the development of the study of Gujarati or Hindi in Devanagari script and the use of them as medium of instruction and examination. This is a composite power. It enables the University not only to develop the study of the said languages but also to use them as media of instruction. There is an essential distinction between the expressions "providing" and "promoting". To promote the development of the said languages means to further their growth. It also implies some action anterior to the existence or occurrence of the thing promoted. The power of promotion confers upon the University the power to prescribe adventitious aids for the purpose of promotion. To illustrate, Gujarati or Hindi is not the medium of instruction in the University; the said languages have not got sufficient vocabulary to express scientific and technological concepts; there are no professors who are trained to teach the said subjects in those languages; there are no books in the said languages of a standard appropriate to the needs of higher education. The University can certainly help, financially or otherwise, to enrich the said languages so as to make them suitable vehicles for conveying scientific and technological ideas. It may provide for intensive training of the professors and lecturers in those languages to enable them to have sufficient knowledge for communicating their ideas in those languages. It may give concessions in fees, etc. for students who take those languages as their media of instruction instead of English or any other languages. It may start a pilot college where the medium is only any of those two languages. It may in extreme cases prohibit the use of any medium other than the said two languages. There are many other ways of subsidizing and helping the promotion of the said languages. That apart, clause (27) does not deal only with instruction, but also with examination. Should it be held that the power of the University to prescribe a medium of instruction is derived only from clause (27), it should also be held that the power to prescribe a medium of instruction for examination is also derived therefrom. If so, it would lead to the anomalous position of the University not being in a position to hold examinations in any language other than the said two languages, while in the case of instruction, the affiliated colleges, if the argument of learned counsel for the respondents be correct, will be able to instruct in media other than the said two languages: the University will be absolutely powerless to examine the students of a college through the medium chosen by it. It is, therefore, obvious that clause (27) does not in any way replace or even curtail the undoubted power of the University to prescribe a medium of instruction of its choice, but only confers an additional power and a correlative duty to promote these two languages. If so understood, the proviso also squarely fits in the scheme. What the proviso says is that English may continue to be the medium of instruction and examination in such subjects and for such period until the end of May, 1966. It is enacted as a proviso to clause (27), as, but for that proviso, English may continue to be a medium of instruction, but it cannot be *the* medium or the sole medium of instruction, for there is a duty cast on the University to introduce one or other of the aforesaid two languages as medium of instruction. The proviso enables the University to postpone the introduction of the aforesaid languages as media of instruction for a prescribed period. In this context, the argument based upon the use of the indefinite article in the substantive part of the clause and of the definite article in the proviso may be considered. The use of the indefinite article, it is said, shows that the power of the University is only to prescribe an additional medium, for otherwise the Legislature would have used the words "*the* medium" as it has done in the proviso. Grammatically the definite article "*the*" could not have been used in the substantive part: the definite article is used only to mark the object as before mentioned or already known or contextually particularized. That is why in the proviso the definite article is used in the context of the English language which is already in the field as the exclusive medium of instruction. But in the substantive part of clause (27) the Legislature was providing for an additional power to promote one or other of the two languages mentioned therein or both of them. In that context when different languages, which can alternatively be prescribed, are mentioned, the appropriate article can only be the indefinite.

article. If the argument of learned counsel for the respondents be accepted, it may lead to a more serious anomaly, namely that after the prescribed period in the proviso the University becomes powerless to introduce any language other than Gujarati or Hindi as medium of instruction and examination. This difficulty is sought to be met by the contention that the power to continue English as a medium of instruction after the period prescribed in the proviso, is necessarily implied in the proviso. The doctrine of necessary implication as applied to the law of statutory construction means an implication that is absolutely necessary and unavoidable. It is not implication by conjecture. I would be attributing to the Legislature an ineptitude in drafting if I should hold that such an important power of prescribing a medium of instruction is left to be implied by construction. It would also be against the natural meaning of the phraseology used in the proviso. The Legislature in enacting clause (27) of section 4 must be deemed to have had knowledge that the University has prescribed English as the medium in exercise of the powers vested in it and with that knowledge the Legislature proceeded to enact in the proviso that the University could continue English as the sole medium for a prescribed period. The proviso, therefore, was enacted on the assumption of an existing power: it was not conferring the power for the first time. Should it be held that the proviso conferred the power on the University to prescribe English as a medium for the first time, it should also be held that the University could not prescribe any medium other than English, Hindi or Gujarati after the period prescribed in the proviso. But, on the other hand, if clause (27) is construed in the manner I have done, i.e., it is only a power conferred on the University in addition to its existing power to prescribe a medium or media of instruction, the relevant provisions fall into a piece. The University will then have powers, to prescribe any medium or media, to promote Hindi and Gujarati, to introduce the use of Hindi and Gujarati, to continue English as the sole medium of instruction for the prescribed period and after the said period has run out to prescribe English or any other language as the medium of instruction in addition to Hindi or Gujarati. If the artificial construction suggested by the respondents be accepted, the Legislature should be held to have deprived the University not only of its power to discontinue English as the medium of instruction but also to have prevented it from introducing any medium other than English, Hindi or Gujarati. For the aforesaid reasons I would hold that clause (27) of section 4 of the Act gives only an additional power and it does not derogate from the implied power derived from other provisions of the Act.

Some argument is advanced on the basis of section 18 (1) (xiv) of the Act, which reads :

"18. (1) Subject to such conditions as may be prescribed by or under the provisions of this Act, the Senate shall exercise the following powers and perform the following duties, namely :—

* * * * *

(xiv) to make provision relating to the use of Gujarati or Hindi in Devanagari script or both as a medium of instruction and examination".

Learned Counsel for the appellant contends that while clause (27) of section 4 confers a power on the University, clause (xiv) of section 18 (1) confers both a power and a duty on the Senate to provide for the use of Gujarati or Hindi in Devanagari script as medium of instruction and examination. Learned Counsel for the respondents again emphasize upon the use of the indefinite article in the said clause. I cannot agree with either of the two contentions. When a power is conferred on the University to promote the said two languages as medium of instruction, presumably for public good, there is a correlative duty on the University to exercise that power. The fact that under section 4 only powers are conferred, whereas under section 18 both powers and duties are mentioned, does not make much difference in a case where a power is conferred for public good. The statute uses three expressions, namely, "provide", "promote", and "make a provision." Under the statute the powers of the University can only be exercised through the instrumentalities of the University in the manner prescribed. In section 18 the words used are neither "provide" nor "promote" but "to make provision" indicating thereby

that specific provisions have to be made presumably through statutes. As the University has got power to provide for the exclusive medium and also to promote the use of the said two languages as media of instruction, the Senate is authorized to make statutes providing for the former in exercise of its power under section 18 (1) (i) and for the latter under section 18 (1) (xiv). As to the promotion of the development of the study of Gujarati and Hindi in Devanagari script, the Senate, the Syndicate and the Academic Council may make the requisite laws in exercise of the appropriate powers conferred on them. The use of the indefinite article "a" in clause (xiv) of section 18 (1) is not of much relevance, for, as I have already pointed out, it is the appropriate article in the context.

Another contention accepted by the High Court, namely, that section 4 (1) and other clauses of the section apply only to residential colleges, was faintly advanced by learned Counsel for the respondents. There is absolutely no force in it, as the phraseology of the said clauses is wide and comprehensive and does not admit of any such limitation.

The argument that this construction will enable the University to abolish English altogether as a medium of instruction, as it is done in the present case, have no relevance, for it can certainly do so, if it has power in that regard. The Constitution depended upon the State Legislatures and the Universities for imparting education at the University level. The Legislature in its turn, rightly in my view, conferred the necessary powers on the University, in the interest of higher education. No one is better qualified than the representatives of the intelligentsia of the State who man the various instrumentalities of the University to decide on the medium of instruction to be introduced in the colleges affiliated to the University. It may be that a particular University may have accelerated the pace of the introduction of a regional language as the medium of instruction at the university level, but other Universities are following a more cautious policy. It is for the University to decide its own course. If the statute has conferred the power, as I have said it has, these considerations are of no avail.

It is not disputed that if the University has the power to prescribe an exclusive medium of instruction under a statute, section 38-A of the Act which is a consequential provision would be valid.

For the aforesaid reasons I hold that the University was well within its right in prescribing, by statutes, the said two languages as media of instruction to replace English by stages.

In the result the order of the High Court is set aside and the appeals are allowed with costs of the appellants here and in the High Court.

The Court made the following order, delivered by
Sinha, C.J.—In accordance with the view of the majority, both the appeals stand dismissed in the manner indicated in the majority judgment, with costs. There will be one set of hearing fee.

Appeals dismissed.

V.S.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—B. P. SINHA, *Chief Justice*, S. J. IMAM, K. SUBBA RAO, K. N. WANCHOO, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Swami Moior Transportis (P.) Ltd. and another .. *Appellants**

v.

Sri Sankaraswamigal Mutt and another .. *Respondents.*

The Advocate-General for the State of Madras and another .. *Interveners, etc.*

Constitution of India (1950), Article 14—Reasonable classification—Principles—Articles 19 (1) (g) and 31—Article 19 (1) (g) extends to concrete as well as abstract right to property.

Madras City Tenants Protection Act (III of 1920) as amended by Act (XIII of 1950)—Objects of the Act—Not only to protect the tenants of residential buildings but also of non-residential buildings—Section 9—Right to purchase the land—Amending Act (XIII of 1950) withdrawing the benefit extended to non-residential buildings in one locality—It affects right to property—It involves violation of Article 14 and Article 19 (1) (g) or Article 31 of the Constitution.

(1) There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles ;

(2) it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds ;

(3) in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation ; and

(4) while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

The said propositions are subject to the main principle of classification, namely, that classification must be founded on intelligible differentia and the differentia must have a rational relation to the object sought to be achieved by the statute in question ; and that the classification may be founded on different bases, such as, geographical, or according to objects or occupations or the like.

The object of the Amending Act (XIII of 1950) was to protect the tenants not only of dwelling houses in the City of Madras but also of other buildings in that City. The provisions of the principal Act also, apply both to residential and non-residential buildings. So too the 1955 Act. Therefore when in the "Objects and Reasons", attached to Act (XIII of 1950) the authors of that Act stated that it was enacted with the main object of safeguarding the tenants from eviction from residential quarters, they were only emphasizing upon the main object but were not excluding the operation of that Act to non-residential buildings. So it is not correct to state that the object of the Act is only to protect the tenants of residential buildings.

It is true that population alone cannot be a basis for the classification made under the Act, but concentration of large population is generally found only in towns where there are commerce and industries. Though it is possible that a smaller town with a lesser population may also have heavy industries and commercial activities, that is an exception rather than the rule. But in this case the Gazetteer supports the averment made by the State that the municipal towns selected for preferential treatment are more advanced commercially than other towns in the State.

There are real differences between non-residential buildings in the town of Madurai, Coimbatore, Salem and Tiruchirappalli and those in other towns of the Madras State which have reasonable nexus to the object sought to be achieved by the Act.

The phraseology used in Article 19 (1) (f) is wide and *prima facie* it takes in its sweep both abstract and concrete rights of property. To suggest that abstract rights of a citizen in property cannot be infringed by the State, but his concrete rights can be, is to deprive Article 19 (1) (f) of its real content.

Article 31 (1) is couched in a negative form. It says that no person shall be deprived of his property save by authority of law. In effect it declares a fundamental right against deprivation of property by executive action, but it does not either expressly or by necessary implication take the law out of the limitations implicit in Article 19 (1) (f) of the Constitution. The law in Article 31 (1) must be a valid law and to be a valid law it must stand the test of other fundamental rights.

A law depriving a person of his property would be bad unless it amounts to a reasonable restriction in the interest of the general public or for the protection of the interests of Scheduled Tribes.

The right conferred under section 9 of the Madras Act (III of 1920) is a right to purchase land. If such a right conferred under a contract is not a right of property, the fact that such a right stems from a statute cannot obviously expand its content or make it any the less a non-proprietary right. It is settled law that a contract to purchase a property does not create an interest in immovable property. A statutory right to apply for the purchase of the land is not a right of property.

Section 9 of the principal Act, extended by the 1955 Act, only confers a right in respect of the land and not of the superstructure. If that Act held the field, the tenants could have purchased the land, but by reason of the 1960 Act they could no longer do so. Neither the 1955 Act conferred any right as to the superstructure under section 9 of the principal Act nor did the 1960 Act take that right away.

The question whether the tenants by reason of the specific stipulation in their lease deeds that they would vacate their lands within a prescribed period would not be entitled to any relief even under the 1955 Act was not decided.

Appeals from the Judgment and Order dated the 26th June, 1961 of the Madras High Court in Writ Petitions Nos. 829 and 833 of 1960.

A. V. Viswanatha Sastri, Senior Advocate (*G. Ramaswami*, Advocate and *J.B. Dadacharji*, *O.G. Mathur* and *Ravinder Narain*, Advocates of *M/s. J.B. Dadacharji & Co.* with him), for Appellants (In both the appeals).

S. Kothandarama Nayanar and *M.S.K. Aiyangar*, Advocates, for Respondent No. 1 (In both the appeals).

A. Ranganadham Chetty, Senior Advocate (*A.V. Rangan*, Advocate with him), for Intervener No. 1 (In both the appeals).

R. Thiagarajan, Advocate, for Intervener No. 2 (In C. A. No. 228 of 1962).

The Judgment of the Court was delivered by *Subba Rao, J.*—These two appeals on certificate raise the same points and arise out of a common order made by the High Court of Judicature at Madras in Writ Petitions Nos. 829 and 833 of 1960. Both of them may conveniently be disposed of together.

The facts in Civil Appeal No. 228 of 1962 are briefly as follows: The first appellant is a limited company carrying on transport business. The second appellant is its managing director. The first appellant took over the business of Swami Motor Service Company, of which the second appellant was the Managing Partner. In his capacity as Managing Partner of the said company, the second appellant took a lease of a vacant site, being survey No. 2770, belonging to the first respondent. After the first appellant took over the business of the said partnership company, including its leasehold interest in the said site, the first respondent recognized him as his tenant and was receiving the rent from him. It is alleged that the appellants constructed many valuable structures on the said site. The first respondent *i.e.*, Sri Sankaraswamigal Mutt, through its trustee, filed a suit, O.S. No. 103 of 1953, in the Court of the District Munsif, Tanjore, for evicting the appellant-company from the site; and on 30th June, 1954 a compromise decree for eviction was made therein giving six months' time for the appellant-company to vacate the site. The decree-holder filed an execution petition in the said Court against the first appellant for executing the decree. Pending the execution petition, Madras Act XIX of 1955 was passed empowering the State Government to extend the Madras City Tenants' Protection Act, 1921 (III of 1922), hereinafter called the "principal Act", to any municipal town by notification in the *Fort St. George Gazette*. In exercise of the powers conferred by Act XIX of 1955, the Government made an order notifying the Town of Tanjore to have come within the purview of the principal Act. Under the provisions of the principal Act, the appellants filed Original Petition No. 39 of 1956 in the said Court for an order directing the execution of a conveyance of the said site in favour of the company on payment of a price fixed by the Court. Those proceedings took a tortuous course mainly, it is alleged, on account of obstructive tactics adopted by the respondents in anticipation of an expected legislation withdrawing the benefits conferred on tenants of non-residential buildings in the Town of Tanjore. As anticipated the State Legislature passed Act XIII of 1960, amending the principal Act: the effect of the amendment was to withdraw the protection given to tenants of non-residential buildings in the municipal town of Tanjore and certain other towns. Under the provisions of the

impugned Act, proceedings instituted under the provisions of the principal Act relating to non-residential buildings situated in towns other than those preferred would abate. The appellants filed a petition under Article 226 of the Constitution in the High Court of Judicature at Madras for the issue of a writ of *mandamus* directing the District Munsif to dispose of the petition in accordance with the provisions of section 9 of the principal Act, as it stood before its amendment by Act XIII of 1960.

In Civil Appeal No. 229 of 1962 the subject-matter is a site, being survey No. 74, Railway Road, Tanjore, belonging to the first respondent to this appeal. The appellant's father executed a lease deed in favour of the first respondent in respect of some parts of the said site; the lease deed contained a clause giving an option to the tenant to renew the lease for a further period of 10 years. It is alleged that the appellant's father had erected substantial structures at heavy cost on the site even before the said lease as he was in possession of the said site as a tenant under the predecessor of the first respondent. After the expiry of 10 years, the appellant's father exercised the option and continued to be in possession of the property as tenant. The first respondent filed a suit (O.S. No. 315 of 1950) in the Court of the District Munsif, Tanjore, for evicting the appellant from the property, and obtained a compromise decree dated 10th January, 1952. Under the compromise decree the tenancy was extended to 12 years from 1st January, 1952 and after the expiry of that period the first respondent was entitled to execute the decree and take possession of the site after removing the superstructures. Subsequently, as already noticed, the provisions of the principal Act were extended to the Town of Tanjore. Thereupon the appellant's father filed O.P. No. 43 of 1956 in the Court of the District Munsif, Tanjore, for an order directing the first respondent to convey the site in his favour on payment of the price to be fixed by the Court. As in the first case, in this case also the proceedings dragged on till the Act of 1955 was passed. The appellant filed a petition under Article 226 of the Constitution in the High Court of Judicature at Madras for the issue of a writ of *mandamus* directing the District Munsif, Tanjore, to dispose of the application in accordance with the provisions of the principal Act prior to its amendment by Act XIII of 1960.

In both the petitions the appellants attacked the constitutional validity of Act XIII of 1960. The High Court, by a common order, upheld the constitutional validity of the said Act following the decision of a Division Bench of the same Court, in *Swaminathan v. Sundara*¹. These two appeals, as aforesaid, have been preferred on certificate issued by the High Court.

Mr. A.V. Viswanatha Sastri, learned Counsel for the appellants in both the appeals, raised before us the following points: (1) The 1960 Act infringes the fundamental right of the appellants under Article 14 of the Constitution for two reasons, namely, (i) while the object of enacting the 1960 Act was for safeguarding tenants from eviction from residential buildings, its provisions introduce a classification between non-residential buildings in different municipal areas and gives relief to tenants of non-residential buildings in some towns and refuses to give the same relief to similar tenants of such buildings in other towns in the State and such a classification has absolutely no relevance to the object sought to be achieved by the Act; and (ii) the 1960 Act makes a distinction between non-residential buildings in Madras, Salem, Madurai, Coimbatore and Tiruchirapalli on the one hand and those in other towns, including Tanjore, on the other and gives protection to the tenants of such buildings in the former group and denies the same to tenants of similar buildings in the latter group, though the alleged differences between the two sets of localities have no reasonable relation to the object sought to be achieved, namely, the protection of tenants who have built substantial structures from eviction. (2) The 1960 Act also offends Articles 19 (1) (f) and 31 (1) of the Constitution as it is not a reasonable restriction in the interest of the public on the proprietary rights acquired by the appellants under the earlier Act XIX of 1955.

Mr. Nayanar, appearing for the first respondent in both the appeals, contends, that sections 3 and 9 of the principal Act could not be invoked by the appellants, as the lease deeds executed by them contain a clear covenant that they would vacate their lands within a prescribed period and as they had put up their buildings subsequent to the execution of the lease deeds. He sustains the constitutional validity of the 1960 Act on the ground that it neither offends Article 14 nor Article 19 of the Constitution.

Mr. A Rangandham Chetty, appearing for the State of Madras, to which notice was given, elaborates the second contention advanced by learned Counsel for the respondents by placing before us some statistical data which, according to him, affords, a reasonable basis for the classification. As regards the contention based on Article 19, he contends that the rights conferred under Act XIX of 1955, namely, right to compensation on eviction under section 3 of the said Act and the right to obtain a sale deed under section 9 thereof, are only analogous to a right to sue or a right to purchase a property and they could not in any sense of the term be equated with property rights.

Before we consider the arguments, it would be convenient to notice the scope of the relevant provisions of the principal Act, Act XIX of 1955 and Act XIII of 1960. The principal Act as amended by Act XIX of 1955, was enacted as its Preamble shows, to give protection to certain classes of tenants who in municipal towns and adjoining areas in the State of Madras have constructed buildings on others' lands in the hope that they would not be evicted so long as they paid a fair rent for the land. The gist of the relevant provisions of the principal Act as amended by Act XIX of 1955, may be stated thus: The Act applies to any building, whether it is residential or non-residential. Every tenant shall on ejection be entitled to be paid as compensation the value of any building which may have been erected by him and also the value of trees which may have been planted by him; in a suit for ejection the Court shall ascertain the amount of compensation payable by the landlord to the tenant and the decree shall direct that the landlord shall be put in possession of the land only on payment of the said amount in Court within the prescribed time; if the landlord is unable or unwilling to pay the compensation within the prescribed time, he may apply for fixing a reasonable rent for the occupation of the land by the tenant; a tenant who is entitled to compensation and against whom a suit for ejection has been instituted, may apply for an order that the landlord may be directed to sell the land to him for a price to be fixed by the Court, and thereupon the Court shall fix the price in the manner prescribed in section 9 and direct the said amount to be paid to the landlord by the tenant within a particular time and in default his application shall stand dismissed. Nothing contained in the Act shall affect any stipulations made by the tenant in writing registered as to the erection of buildings, in so far as they relate to buildings erected after the date of the contract: the provisions of the Act apply to suits for ejection which are pending and in which decrees for ejection have been passed but have not been executed before the coming into force of the Act: *vide* sections 2 (1), 2 (1-A), 3, 4, 6, 9 and 12 of the Act. It is, therefore, clear that under the principal Act tenants in the Madras City acquired valuable rights which they did not have before the said Act was passed. Prior to the principal Act a tenant of a land over which he had put up buildings for residential or non-residential purposes was liable to be evicted in accordance with law and his only right was to remove the superstructure put up by him on the land before delivering vacant possession. But after the principal Act, a tenant similarly situated has an option to claim either compensation for the superstructure put up by him or to apply to the Court to have the land sold to him for a consideration to be fixed by it.

The principal Act was amended by the Madras Act XIX of 1955 empowering the State Government to extend, by notification in the Official Gazette, the protection given by the principal Act to tenants of any other municipal town in the State of Madras and any specified village within five miles of the City of Madras or such municipal towns who have constructed buildings on others' lands with the hope that they would not be evicted so long as they paid fair rent. In exercise

of the power so conferred, the State Government issued on 28th March, 1956, a notification extending the principal Act to the municipal town of Tanjore. The result of the notification was that tenants like the appellants who were tenants of land over which they had put up non-residential buildings acquired a right to ask for compensation for the buildings so erected on ejection or to apply to Court for directing the decree-holder to sell the land to the tenants after fixing the price in the manner prescribed in the Act. This Act was also extended to various other towns like Madurai, Coimbatore, Salem and Tiruchirappalli.

The Legislature again changed its mind and passed Act XIII of 1960. By section 3 of that Act the following amendments were made in section 2 of the principal Act :

“(i) for clause (1), the following clause shall be substituted, namely :—

(1) ‘Building’ means any building, hut or other structure, whether of masonry, bricks, wood, mud, metal or any other material whatsoever used—

(i) for residential or non-residential purposes, in the City of Madras, in the municipal towns of Coimbatore, Madurai, Salem and Tiruchirappalli and in any village within five miles of the City of Madras or of the municipal towns aforesaid and

(ii) for residential purposes only, in any other area, and includes the appurtenance thereto.”

Section 9.—Every proceeding pending before any Court, other than a proceeding relating to any property situated in—

(i) the City of Madras,

(ii) the Municipal towns of Coimbatore, Madurai, Salem and Tiruchirappalli, and

(iii) any village within five miles of the City of Madras or of the municipal towns aforesaid, on the date of the publication of this Act in the *Fort St. George Gazette* and instituted under the provisions of the principal Act, shall in so far as such proceeding relates to non-residential buildings, abate and all rights and privileges which may have accrued immediately before such date to any person in respect of any property situated in any area other than the areas referred to above by virtue of the principal Act, shall, in so far as they relate to non-residential buildings, cease and determine and shall not be enforceable :

Provided that nothing contained in this section shall be deemed to invalidate any suit or proceeding in which the decree or order passed has been executed or satisfied in full before the date mentioned in this section.

The result of this amending Act in respect of non-residential buildings in places other than the City of Madras and the other specified municipal towns is that all proceedings pending in Courts in respect of those buildings abated and the rights acquired by tenants under the 1955 Act in respect of the said buildings are extinguished. The rights, so far relevant to the present enquiry, which the tenants had acquired under the 1955 Act were: (i) they were entitled on ejection to be paid as compensation the value of the buildings erected by them or by their predecessors-in-interest, (ii) the Court before issuing a decree for eviction should ascertain the amount due to a tenant and the decree for eviction should be made conditional on the payment of the decree amount, (iii) in suits where decree for ejection had been passed before the 1955 Act came into force, a tenant could file an application for ascertainment of the compensation due in execution and for a fresh decree to be passed in accordance with section 4 of the principal Act, and (iv) he had also a right, at his option, to apply within the prescribed time to the Court for an order directing the landlord to sell the land to him for a price fixed by the Court, whether a decree for ejection had or had not been passed. The tenants of non-residential buildings, in places other than the City of Madras and the specified municipal towns lost the said rights after the 1960 Act came into force.

The first question is whether the 1960 Act, in so far as it withdrew the rights conferred upon the tenants of non-residential buildings in Tanjore, offends Article 14 of the Constitution, or whether it can be justified on the doctrine of classification. The law on the subject is so well settled that it does not call for an extensive restatement: it would be enough if the relevant propositions in the judgment of

this Court in *Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar*¹, are noticed, and they are:

"(1) there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles ;

(2) it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discrimination are based on adequate grounds ;

(3) in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation ; and

(4) while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

All the said propositions are subject to the main principle of classification, namely that classification must be founded on intelligible differentia and the differentia must have a rational relation to the object sought to be achieved by the statute in question; and that the classification may be founded on different bases such as, geographical, or according to objects or occupations or the like: see *Budhan Chowdhry v. The State of Bihar*² and *The State of West Bengal v. Anwar Ali Sarkar*³.

Bearing the said well settled principles in mind, let us now proceed to consider them in relation to the facts of this case. The first contention is that the object of the Act is to safeguard the tenants from eviction from residential quarters, but it affords protection to tenants of non-residential buildings in the City of Madras, in the municipal towns of Coimbatore, Madurai, Salem and Tiruchirappalli and in any village within five miles of the aforesaid City and municipal towns, and there is no rational relation between the said classification and the object of the Act. The object of the Act, the argument proceeds, is to protect the tenants of residential buildings, whereas the Act protects also the tenants of non-residential buildings in the aforesaid City and municipal towns. So stated the argument appears to be plausible, but a closer scrutiny reveals that the object of the Act is to protect not only tenants of residential buildings but also of other buildings, though it is mainly conceived to protect the tenants of residential buildings. The following is the Statement of Objects and Reasons attached to Act XIII of 1960:

"The Madras City Tenants' Protection Act, 1921, was enacted with the main object of safeguarding the tenants from eviction from residential quarters.

In consistence with this object it is proposed to restrict the application of the Madras City Tenants' Protection Act, 1921 (Madras Act III of 1922) to residential buildings only."

It will be noticed from the above that the main object of the Act is to safeguard the tenants of residential buildings from eviction but it is not the sole object of that legislation. The Objects of the 1960 Act only refer to the Objects of the principal Act. The Objects and Reasons of the principal Act are given in the Fort St. George Gazette dated 26th July, 1921, at page 1491. The relevant part of the Objects reads thus :

"In many parts of the City of Madras dwelling houses and other buildings have, from time to time been erected by tenants on land belonging to others in full expectation that subject to payment of fair ground rent, they would be left undisturbed in possession, notwithstanding the absence of any specific contract as to the duration of the lease or the terms on which the buildings were to be erected. Recently attempts made or steps taken to evict a large number of such tenants, have shown that such expectations are likely to be defeated....."

The Bill provides for the payment of compensation to the tenant in case of ejection for the value of any buildings which may have been erected by him or by his predecessors-in-interest. It also provides for settlement of fair rent at the instance of the landlord."

1. (1959) S.C.J. 147 : (1959) 1 An.W.R. (S.C.) 67 : (1959) 1 M.L.J. (S.C.) 67 : (1959) S.C.R. 279, 297-293.

2. (1955) S.C.J. 163 : (1955) 1 S.C.R. 1045.
3. (1952) S.C.J. 55 : (19532) S.C.R. 284.

The object of the said Act was to protect the tenants not only of dwelling houses in the City of Madras but also of other buildings in that City. The provisions of the principal Act also, it is not disputed, apply both to residential and non-residential buildings. So too the 1955 Act. Therefore, when in the "Objects and Reasons" attached to Act XIII of 1960 the authors of that Act stated that it was enacted with the main object of safeguarding the tenants from eviction from residential quarters, they were only emphasizing upon the main object but were not excluding the operation of that Act to non-residential buildings. So it is not correct to state that the object of the Act is only to protect the tenants of residential buildings. There are no merits in this contention.

There is more serious contention is that there is no rational basis for classifying the tenants of non-residential buildings in the City of Madras and the municipal towns of Madurai, Coimbatore, Salem and Tiruchirappalli and those of similar buildings in other towns like Tanjore. It is said that if protection is necessary for the tenants of non-residential buildings in the said City and towns, the same protection is equally necessary for tenants of similar buildings in Tanjore and other towns. To state it differently, the argument is that there are no intelligible differences between the non-residential buildings located in the City of Madras and the municipal towns of Madurai, Coimbatore, Salem and Tiruchirappalli and those situated in other towns. The learned Judges of the High Court in *Sivaminathan v. Sundara*¹, which was followed in the present case, advertent to this argument observed at page 987:

"It is apparent that having regard to the large population in the first five areas and the large scale commercial activities in these areas, the Legislature thought fit that non-residential quarters occupied by tenants on lands belonging to others should also be offered relief from being evicted summarily and arbitrarily."

This passage was criticized by learned Counsel for the appellants and it was asked, what was the relevancy between the population of the different towns in the matter of eviction of tenants from non-residential buildings? The population of a town is not a relevant circumstance though its density may be: the pressure on the buildings, or on the sites suitable for building purposes does not depend solely upon population without reference to the area available for building purposes, so the argument proceeds. Mr. A. Ranganadham Chetty, appearing for the State of Madras, attempted to place before us statistics to establish that towns preferred under the Act are highly populated industrial and commercial centres of the State compared to other towns like Tanjore and, therefore, there would necessarily be high pressure on non-residential buildings in the said localities and consequently a spate of evictions. Before looking into the statistics it would be convenient to notice the allegations made in the affidavits. On behalf of the State of Madras, J. Shivanandam, Secretary to Government, has filed an affidavit, wherein he says in paragraph 8:

"On facts the position is that these four towns of Madurai, Tiruchinopoly, Salem and Coimbatore ranked the first four next to the City of Madras in population, income and commercial activities and a very large number of tenants had been enjoying the protection afforded by the then existing provision of this Act, in respect of residential and non-residential buildings as well. It was therefore thought that it would not be proper to deprive these tenants of the protection in respect of non-residential buildings."

It may at once be noticed that the industrial potential of the preferred towns is not specifically mentioned. But it appears to us that the expression "commercial activities" is used in a comprehensive sense so as to take in industrial activities. This statement is sought to be supported in the affidavit by the proceedings of relevant authorities and the correspondence that passed between the State and the Union Governments. The following extract from the Select Committee's proceedings throws further light on the subject:

".....on the reports received from Collectors, the Act was extended to certain Municipalities. But it was found that such extension caused inconveniences to public bodies and other institutions which owned the lands inasmuch as they were not able to get sufficient returns from these to carry on their activities under present conditions.....However it was represented that in the case of Madras City such a restriction would cause considerable hardship to the large number of small

business establishments and the privilege and concession enjoyed by them over such a long period should not be interfered with. While the Government felt the reasonableness of this demand that in the City non-residential buildings should not be excluded from the protection afforded by the Act, they were of the view that in place where the provisions were being extended they should apply only to residential buildings."

".....having regard to the wishes of certain Hon. members that not only in the City but in other municipalities also there should be no distinction between residential and non-residential buildings, he (the Chairman) proposed to add the four municipalities of Madurai, Tiruchirappalli, Salem and Coimbatore, in sub-clause (i) of the proposed clause (1) "

These passages disclose not only the legislative objects but also the political pressures for certain amendments. But we are not concerned with the political aspects of the legislation but only with its objects. The special treatment given to the City of Madras and the other specified towns is based upon the fact that there are a number of small business establishments in Madras and other specified towns implying thereby that there are not so many such establishments in other towns. The correspondence between the Government of India and the Government of Madras throws light on this question. It is stated therein :

"Most of the tenancies of non-residential buildings which enjoyed protection from eviction are in the City of Madras and the Municipal towns of Madurai, Coimbatore, Salem and Tiruchirappalli which have been classed as Special Grade or Selection Grade municipalities on the basis of income and population....."

"This concession is considered necessary because in the City of Madras and in the said four Municipal towns there are a large number of such tenants to whom denial of the protection will cause great hardship. They have been enjoying this protection for some time past and they have invested large sums of money in the hope that they will not be evicted so long as they pay the rent due."

This again emphasizes the fact that the preferred towns are of special importance and that comparatively a large number of non-residential buildings are situated in the said City and town. G.O. No. 331. L.A. dated 18th. February, 1953, passed by the Government of Madras also shows the comparative importance of the said towns. It is stated therein :

"They (Government) consider, however, that in view of the size and importance of the three municipalities (Tiruchirappalli, Coimbatore and Vijayawada) referred to above and also of those of the Salem Municipality, the four municipalities stand distinctly apart from the other first grade municipalities, excluding of course Madurai Municipality which stands in a class by itself. The Government accordingly direct that with effect from 1st April, 1953, the municipalities of Coimbatore, Salem and Tiruchirappalli and Vijayawada be classified as selection grade municipalities....."

In the reply affidavit many of the factual assertions made in the counter-affidavit have been denied. It is alleged that the number of tenants of non-residential buildings who enjoyed the benefit of the provisions of the Act in municipal towns like Tanjore, Vellore and Connoor is also large. It is denied that the preferred towns other than the City of Madras have been enjoying the protection for a long time, for the Amending Act itself was passed only in 1955. It is pointed out that the population of a town is irrelevant but density of population matters and that the density of population in Tanjore, Coimbatore, Madurai and Salem is the same. Out of the allegations and counter-allegations the following facts emerge: (1) Madras is a city of large population and the municipalities of Coimbatore, Salem and Tiruchirappalli as selection grade municipalities on account of their size and importance; they have comparatively large population and commercial potentialities; (2) in the said towns there are a large number of non-residential buildings; and (3) in the said towns there are a large number of non-residential buildings in Tanjore compares except for some vague averments made in the reply affidavit, there is nothing on record to establish that the number of non-residential buildings in Tanjore compares favourably with that in the preferred town. These facts are, to some extent, supported by the statistical data furnished before us from authorised Government publications. In "Madras District Gazetteers, Madurai," it is stated at page 172:

"Madurai is one of the very few districts in this State in which a comparatively large portion of the population, about 57 per cent., lives by industries, trade and other avocations. This is no wonder, seeing that it has never had, in spite of irrigation works, any facilities like Tanjore for absorbing the great bulk of its population in agriculture. In fact it stands next to the Coimbatore district in possessing a considerable proportion of the non-agricultural population."

Though the statement refers to the districts as a whole, it is well known that most of the industries are concentrated in the municipal towns of Madurai and Coimbatore. In "India 1962" the following figures of population in some Towns of Madras State are given :

Madurai	.. 4,24,975
Coimbatore	.. 2,85,263
Tiruchirappalli	.. 2,49,933
Salem	.. 2,49,084
Tuticorin	.. 1,24,273
Vellore	.. 1,13,580
Tanjore	.. 1,10,968
Nagercoil	.. 1,06,497

It is not necessary to pursue the matter further. It is true that population alone cannot be a basis for the classification made under the Act, but concentration of large population is generally found only in towns where there are commerce and industries. Though it is possible that a smaller town with a lesser population may also have heavy industries and commercial activities, that is an exception rather than the rule. But in this case the Gazetteer supports the averment made by the State in the affidavit that the municipal towns selected for preferential treatment are more advanced commercially than other town in the State. Though the Government, at the earlier stages of this litigation or even before the 1960 Act, was passed, did not bring out these differences based upon commerce and industry as prominently as its counsel now seeks to do before us, we cannot brush aside the argument as an afterthought. That apart, the Government of Madras was not a party in the High Court and it had no opportunity to put forward its case before that Court. On the basis of the allegations made in the affidavit filed on behalf of the State of Madras, supported as it is by the statistical data furnished before us we hold that there are real differences between non-residential buildings in the towns of Madurai, Coimbatore, Salem and Tiruchirappalli and those in other towns of the Madras State which have reasonable nexus to the object sought to be achieved by the Act.

The more difficult point is the impact of Articles 19 (1) (f) and 31 (1) of the Constitution on the impugned provisions of the Act. The relevant Articles of the Constitution read thus :

"Article 19 (1) (f)—All citizens shall have the right to acquire, hold, and dispose of property.

Article 31 (1)—No person shall be deprived of his property save by authority of law."

To seek the protection of either of these Articles it must be established that the tenants of residential buildings in Tanjore had acquired a right to property, for unless they had acquired such a right, the 1960 Act could not have deprived them of such a right or imposed any restrictions thereon. The question, therefore, is whether the rights created by the 1955 Act by extending the provisions of sections 3 and 9 of the principal Act to such tenants had given them a right to property. The argument of learned Counsel for the State of Madras may be summarized thus : Article 19 (1) (f) deals with abstract rights of property, while Article 31 (1) with concrete rights ; under Article 31 (1) there is no limitation on the power of the appropriate Legislature to make a law depriving a person of his property; the only restriction in the case of deprivation of property by a State is that it can be done only by a statutory law ; if so, on the assumption that the Act of 1955 conferred a concrete right of property on the appellants they have been validly deprived of it by the 1960 Act and therefore no fundamental right of the appellant had been infringed ; if, on the other hand the argument proceeds Articles 19 (1) (f) and 31 (1) are both held to relate to concrete rights of property it would lead to two anomalies, namely, (i) Article 31 (1) would become otiose and (ii) as deprivation of property cannot possibly be a restriction on the right to hold property, every law depriving a person of his property would invariably infringe Article 19 and therefore would be void. In support of his contentions he relies upon the observations of Patanjali Sastri, C.J.

and Das, J., as he then was in *The State of West Bengal v. Subodh Gopal Bose*¹. In that case Patanjali Sastri, C.J., made the following observations :

"I have no doubt that the framers of our Constitution drew the same distinction and classed the natural right or capacity of a citizen to acquire, hold and dispose of property" with other natural rights and freedoms inherent in the status of a free citizen and embodies them in Article 19 (1) while they provided for the protection of concrete rights of property owned by a person in Article 31."

These observations no doubt support learned Counsel's contention, but this Court in a later decision in *The Commissionr, Hindu Religious Endowments, Madras v. Sri Laksminidra Thirtha Swamiar of Sri Shirur Mutt*,² considered the said observations and remarked.

"This, it may be noted, was an expression of opinion by the learned Chief Justice alone and it was not the decision of the Court ; for out of the other four learned Judges who together with the Chief Justice constituted the Bench, two did not definitely agree with this view, while the remaining two did not express any opinion one way or the other. This point was not raised before us by the Advocate-General for Madras who appeared in support of the appeal, nor by any of the other counsel appearing in this case. The learned Attorney-General himself stated candidly that he was not prepared to support the view taken by the late Chief Justice as mentioned above and he only raised the point to get an authoritative pronouncement upon it by the Court. In our opinion, it would not be proper to express any final opinion upon the point in the present case when we had not the advantage of any arguments addressed to us upon it. We would prefer to proceed, as this Court has proceeded all along, in dealing with similar cases in the past, on the footing that Article 19(1)(f) applies equally to concrete as well as abstract rights of property."

Though this Court has not finally expressed its opinion on the question raised, it has pointed out that it has proceeded all through on the basis that Article 19 (1) applies equally to concrete as well as abstract rights of property. In *Chrianjit Lal Chowdhuri v. The Union of India*³, Mukherjee, J., as he then was, held that the right to hold property under Article 19 (1) (f) meant the right to possess as well as enjoy all the benefits which were ordinarily attached to ownership of property. Jagannadhadas, J., in *The State of West Bengal v. Subodh Gopal Bose*¹, dealing with this point observed at pages 668-669.

"To me, it appears, that Article 19 (1) (f), while probably meant to relate to the natural rights of the citizen, comprehends within its scope also concrete property rights. That, I believe, is how it has been generally understood without question in various cases these nearly four years in this Court and in the High Courts."

The phraseology used in Article 19 (1) (f) is wide and *prima facie* it takes in its sweep both abstract and concrete rights of property. To suggest, that abstract rights of a citizen in property cannot be infringed by the State, but his concrete right can be, is to deprive Article 19 (1) (f) of its real content. It would mean that the State could not make a law declaring generally that a citizen cannot acquire, hold and dispose of property, but it could make a law taking away the property, acquired or held by him and preventing him from disposing it of. It would mean that the Constitution-makers declared platitudes in the Constitution while they gave unrestricted liberty to the Legislature to interfere with impunity with property rights of citizens. If this meaning was given to Article 19 (1) (f) the same meaning would have to be given to other clauses of Article 19 (1) with the result that the Legislature cannot make a law preventing generally citizens from expressing their views, assembling peacefully, forming associations, and moving freely throughout the country, but can make a law curbing their activities when they are speaking, when they are assembling and when they are moving freely in the country. Such an intention shall not be attributed to the Constituent-Assembly, unless the Article is clear to that effect. Indeed, the words as we have stated are comprehensive and take in both the rights. Though there is no final expression of opinion by this Court on this question as has been pointed out, this Court and the High Courts all through since the date of promulgation of the Constitution proceeded on the assumption that Article 19 applied to both the rights. We hold that Article 19 applies both to concrete as well as to abstract rights of property.

1. (1954) S.C.J. 127 : (1954) S.C.R. 587.
2. (1954) S.C.J. 335 : (1954) 1 M.L.J. 596:

(1954) S.C.R. 1005, 1020.
3. (1951) S.C.J. 29 : (1950) S.C.R. 869.

It is said that if this construction be given to Article 19 (1) (f) Article 31 (1) would become otiose. We do not see how it becomes an unnecessary provision. Article 31 (1) is couched in a negative form. It says that no person shall be deprived of his property save by authority of law. In effect it declares a fundamental right against deprivation of property by executive action, but it does not either expressly or by necessary implication take the law out of the limitations implicit in Article 19 (1) (f) of the Constitution. The law in Article 31 (1) must be a valid law and to be a valid law it must stand the test of other fundamental rights. All the other points urged in support of the contention have been considered by this Court in *Kavalappara Kottarathil Kochuni v. The State of Madras*¹ where it was held that a law depriving a person of his property must be a valid law and therefore it should not infringe Article 19 of the Constitution. We have no reason to differ from the view expressed therein. Indeed that view has been followed in the later decisions. We, therefore, hold that a law depriving a person of his property would be bad unless it amounts to a reasonable restriction in the interest of the general public or for the protection of the interests of Scheduled Tribes.

We now come to the last question, namely, whether the 1960 Act deprived the appellants of their right in property. To state it differently, the question is whether a tenant of a non-residential building in Tanjore had acquired a right of property under the 1955 Act and whether he was deprived of that right or otherwise restricted in the enjoyment thereof by the 1960 Act. The 1955 Act, as we have already noticed, conferred two rights on such a tenant, namely, (i) every tenant on ejection would be entitled to be paid as compensation the value of any building erected by him, and (ii) such a tenant against whom a suit in ejection has been instituted has an option to apply to the Court for an order directing the landlord to sell the land, to him for a price to be fixed by the Court. We are not concerned here with the rights conferred under section 3 of the Act, for the simple reason that neither of the appellants claimed a right thereunder. Both of them have taken proceedings only under section 9 of the Act and they have approached the High Court for a writ of *mandamus* that the petition should be disposed of under the provisions of section 9 of the Act. This Court's opinion on the question of the constitutional validity of the Act in so far as it deprived the appellants of their right under section 3 of the principal Act is not called for : that will have to be decided in an appropriate case. The question that falls to be considered is whether the second right, namely, the right of a tenant to apply to the Court for an order directing the landlord to sell the land to him for a price to be fixed by it, under section 9 of the principal Act is a right to property. The law of India does not recognize equitable estates. No authority has been cited in support of the contention that a statutory right to purchase land is or confers, an interest or a right in property. The fact that the right is created not by contract but by a statute cannot make a difference in the content or the incidents of the right : that depends upon the nature and the scope of the right conferred. The right conferred is a right to purchase land. If such a right conferred under a contract is not a right of property, the fact that such a right stems from a statute cannot obviously expand its content or make it any the less a non-proprietary right. In our view, a statutory right to apply for the purchase of land is not a right of property. It is settled law that a contract to purchase a property does not create an interest in immovable property. Different consideration may arise when a statutory sale has been effected and title passed to a tenant : that was the basis of the judgment of this Court in *Jayantsinghji v. State of Gujarat*², on which Mr. Viswanatha Sastri relied. But we are not concerned here with such a situation. It is said that the appellants have acquired a right under the 1955 Act to hold and enjoy the buildings erected by them by exercising their right to purchase the site of the said buildings and that the impugned Act indirectly deprived them of their right to hold the said buildings. This argument mixes up two concepts, namely, (i) the scope and content

1. (1961) 2 S.C.J. 443 : (1960) 3 S.C.R. 837.

2. A.I.R. 1962 S.C. 821.

1]

of the right, and (ii) the effect and consequences of the deprivation of that right on the other properties of the appellants. Section 9 of the principal Act, extended by the 1955 Act, only confers a right in respect of the land and not of the superstructure. If that Act held the field, the appellants could have purchased the land, but by reason of the 1960 Act they could no longer do so. Neither the 1955 Act conferred any right as to the superstructure under section 9 of the principal Act nor did the 1960 Act take that right away. If this distinction between the land and the superstructure is borne in mind the untenability of the argument would become obvious. The 1960 Act does not in any way affect the appellant's fundamental right. Therefore, their prayer that the District Munsif should be directed to proceed with the disposal of the applications filed by them under section 9 of the principal Act could not be granted.

In this view it is not necessary to express our opinion on the question whether the appellants, by reason of the specific stipulation in their lease deeds, would not be entitled to any relief even under the 1955 Act. In the result, the appeals fail and are dismissed with costs. One hearing fee.

Appeal dismissed.

V.S.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, Chief Justice, A. K. SARKAR
K. N. WANCHOO, K. C. DAS GUPTA AND N. RAJAGOPALA AYYANGAR, JJ.

Lalji Haridas

v.

The State of Maharashtra and another

Income-tax Act (XI of 1922), sections 37—False statements by witness in assessment proceedings—Criminal complaint under the Penal Code—Proceedings before the Income-tax Officer—Judicial proceedings in a Court—Complaint by the Officer essential—Officer, not a Revenue Court.

Penal Code (XLV of 1860), section 193 and Criminal Procedure Code (V of 1898), section 195—Scope.

In the assessment proceedings relating to L, his business friend M gave evidence on oath before the Income-tax Officer. On the basis of the evidence of M, L was heavily taxed. L filed a criminal complaint under section 193, Indian Penal Code in the Court of the Presidency Magistrate, against M for giving false evidence before the Income-tax Officer. M raised a preliminary objection to the cognizance of the complaint on the ground, that a complaint by the Income-tax Officer himself would be necessary to initiate the proceedings as provided under section 195 (1) (b) Criminal Procedure Code, as the proceedings before the Income-tax Officer were proceedings before a Court. The Magistrate held that the Income-tax Officer was not a Court within the meaning of section 195 (1) (b) of the Criminal Procedure Code, while in Revision against that order the High Court held that the Officer was a Court. On an appeal to the Supreme Court under Article 134 (1) (c) of the Constitution,

Held by Majority: (Gajendragadkar, C.J. Wanchoo and Rajagopala Ayyangar, JJ.) Section 37(4) of the Income-tax Act makes the proceedings before the Income-tax Officer judicial proceedings under section 193, Indian Penal Code and those judicial proceedings must be treated as proceedings in any Court for the purpose of section 195 (1) (b), Criminal Procedure Code.

Under the provisions of the Income-tax Act of 1922 it cannot be held that the Income-tax Officer is a Revenue Court.

Per Das Gupta and A.K. Sarkar, JJ.:—The functions of the Income-tax Officer under the Income-tax Act only makes him a part and parcel of the executive organ of the State. The fact that for carrying out some of these executive functions he will have the powers as are vested in a Court under the Code of Civil Procedure has not the effect of converting him into a limb of the judicial organ. That he has been held to be a quasi-judicial authority is not sufficient to make him a Court. Before he can be called a Court, he must be shown to be part of the judicial organ of the State. The words used in section 37 (4) of the Income-tax Act furnish no reason to alter the legal position that is inescapable on a consideration of the functions of Income-tax Officer that he is not a Court within the meaning of section 195 of the Code of Criminal Procedure. 2. 13

Appeal from the Judgment and Order dated 30th January, 1962, of the Bombay High Court in Criminal Revision Application No. 1142 of 1960.

7th February, 1964.

S. V. Gupte, Additional Solicitor-General of India (*J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

S. K. Kapur, Senior Advocate, (*R. H. Dhebar*, Advocate, with him), for Respondent No. 1.

S. T. Desai, Senior Advocate, (*J. L. Nain* and *V. J. Merchant*, Advocates of *M/s. Gagrut & Co.*, with him), for Respondent No. 2.

The following Judgments of the Court were delivered :

Gajendragadkar, C. J. (for himself *Wanchoo* and *Rajagopala Ayyangar, JJ.*)—The short question of law which arises for our decision in the present appeal is whether the proceeding before an Income-tax Officer under section 37 of the Indian Income-tax Act, 1922 (XI of 1922) (hereinafter called the Act) can be said to be a proceeding in any Court within the meaning of section 195 (1) (b) of the Code of Criminal Procedure. This question arises in this way. The appellant *Lalji Haridas* and respondent No. 2 *Mulji Manilal Kamdar* are businessmen and they carry on their business in Jamnagar and Bombay respectively. They have known each other for several years past in the course of their ordinary business activities. In the income-tax assessment proceedings of the appellant for the assessment years 1949-50 and 1950-51, respondent No. 2 gave evidence on oath before the Income-tax Officer, Ward A, Jamnagar on December 4, 1958. In his evidence he denied that he had a son named *Nihal Chand* and that he had done any business in the name of *M/s. Nihal Chand & Co.* at Jamnagar. According to the appellant, the said statements were false to the knowledge of respondent No. 2 and were made by him to mislead the Income-tax Officer and to avoid the incidence of income-tax on himself. As a result of the said false statements, the appellant was heavily taxed.

On November 24, 1959, the appellant filed a criminal complaint against respondent No. 2 under section 193 of the Indian Penal Code (No. 452/S of 1959) in the Court of the Presidency Magistrate, 19th Court, Esplanade, Bombay. At the hearing of the said complaint, respondent No. 2 raised a preliminary objection that the learned Magistrate could not take cognizance of the said complaint, because the proceedings in which he was alleged to have made a false statement on oath were proceedings before a Court within the meaning of section 195(1)(b), Criminal Procedure Code and since no complaint in writing had been made by the Court of the Income-tax Officer before which the said proceedings were conducted, the provisions of section 195 (1) (b) created a bar against the competence of the appellant's complaint. The learned Presidency Magistrate held that the Income-tax Officer was not a Court within the meaning of section 195 (1) (b), Criminal Procedure Code, and so, he rejected the preliminary objection raised by respondent No. 2.

Against the said decision of the Presidency Magistrate, respondent No. 2 preferred a Criminal Revision Application (No. 1142 of 1960) before the Bombay High Court. The State of Maharashtra was impleaded as respondent No. 1 to the said Revision Application. A Division Bench of the said High Court reversed the conclusion of the Presidency Magistrate and held that the Income-tax Officer was a Court within the meaning of section 195 (1) (b), Criminal Procedure Code, and so, it upheld the preliminary objection raised by respondent No. 2. In the result, the complaint filed by the appellant was ordered to be dismissed. The appellant then applied for and obtained a certificate from the Bombay High Court under Article 134 (1) (c) of the Constitution and it is with the said certificate that he has brought the present appeal before us. That is how the narrow question which arises for our decision in the present appeal is whether the proceedings before an Income-tax Officer are proceedings in any Court under section 195 (1) (b), Criminal Procedure Code. The question thus raised is undoubtedly a short one, but its decision is not easy, because the arguments urged in support of the two respective constructions are fairly balanced and the task of preferring one construction to the other presents some difficulty.

The proceedings before the Income-tax Officer during which, according to the appellant, respondent No. 2 made a false statement on oath, were held by the Income-tax Officer under section 37 of the Act. Section 37 (1) deals with the powers of Income-tax authorities and provides, *inter alia*, that the Income-tax Officer shall, for the purposes of the Act, have the same powers as are vested in a Court under the Code of Civil Procedure, 1908 (V of 1908), when trying a suit in respect of the matters specified by clauses (a) to (d). Section 37 (2) confers upon the Income-tax Officer certain additional powers which can be exercised subject to any rules made in that behalf, provided the said Officer is specially authorised by the Commissioner in that behalf, and in exercising these powers, the provisions of the Code of Criminal Procedure-1898, relating to searches apply. Section 37 (3) deals with the question of impounding and retaining any books of account or other documents. That takes us to section 37(4) which is relevant for our purpose ; this section provides that any proceeding before any authority referred to in this section shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code. It is thus clear that while the Income-tax Officer exercises his powers under section 37 (1), (2) and (3) the proceedings held by him are judicial proceedings for the purposes of the three sections of the Indian Penal Code mentioned in sub-section (4). Therefore, the question as to whether the false statement alleged to have been made by respondent No. 2 was made by him at any stage of a judicial proceeding within the meaning of section 193 Indian Penal Code, must be answered in the affirmative. That is the plain effect of section 37 (4) of the Act.

Section 193 of the Indian Penal Code with which we are directly concerned in the present appeal provides for punishment for intentionally giving false evidence. It consists of two parts ; the first part deals, *inter alia*, with false evidence intentionally given in any stage of a judicial proceeding, and prescribes that the person found guilty of having given such false evidence in a judicial proceeding shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ; the second part deals with cases where false evidence has been intentionally given in any other case, and it prescribes the maximum sentence of three years as well as fine. In other words, if the false evidence has been intentionally given in any judicial proceeding, the sentence awardable is higher than that where false evidence is intentionally given in proceedings which are not judicial. There are three *Explanations* to section 193. *Explanation 1* provides that a trial before a Court-martial is a judicial proceedings ; *Explanation 2* lays down that an investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage, of a judicial proceeding, though that investigation may not take place before a Court of Justice ; this *Explanation* takes in, for instance, committal proceedings. Under *Explanation 3*, an investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice. This *Explanation* covers enquiries before officers deputed by Courts of Justice to ascertain, for instance, on the spot the boundaries of land. It would thus be seen that having provided for a higher sentence in regard to the offence of giving false evidence in any stage of a judicial proceeding, the three *Explanations* of section 193 include within the expression "judicial proceeding" certain proceedings which on a strict construction of the said expression may not have been included under it. For the purpose of the present appeal, however, the only point to notice at this stage is that section 37 (4) of the Act makes a proceeding before an Income-tax Officer, held under the said section a judicial proceeding for the purposes of section 193, Indian Penal Code and that means that if an offence of giving false evidence is proved to have been committed by a person in a proceeding before the Income-tax Officer, he would be liable for the higher sentence awardable under the first part of section 193.

That takes us to section 195 of the Code of Criminal Procedure. It is well-known that section 195 provides for an exception to the ordinary rule that any person can make a complaint in respect of the commission of an offence triable under the Criminal Procedure Code. Section 4 (h) of this Code defines a "complaint" as mea-

ning the allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but does not include the report of a Police Officer. This definition shows that any person can make a complaint in respect of the commission of an offence. Section 190 requires that the Magistrate to whom a complaint has been made should take cognizance of the said complaint, subject to the provisions of the said section. Thus, the general rule is that any person can make a complaint, and section 195 provides for an exception. Section 195 (1) (b) with which we are concerned, provides that no Court shall take cognizance of any offence punishable under the sections therein mentioned, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate; amongst the sections mentioned are sections 193 and 228, Indian Penal Code. The effect of this provision is that if an offence is alleged to have been committed either under section 193 or section 228, Indian Penal Code, and it appears that the said offence was committed in relation to any proceeding in any Court, it is only if the said Court or the Court to which it is subordinate, makes a complaint in that behalf that cognizance will be taken of the said complaint. A person cannot make a complaint in respect of the alleged commission of any of the offences specified in section 195 (1) (b); that is its plain effect.

Section 195 (2) which was added in 1923 when the earlier section 195 was substantially amended, provides that in clauses (b) and (c) of sub-section (1) the term "Court" includes a Civil, Revenue or Criminal Court, but it does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877. It is necessary to deal with the effect of this provision, because, as will presently appear we do not propose to base our decision on the ground that the Income-tax Officer is a Revenue Court under this sub-section. The only point of interest to which we may incidentally refer is that this sub-section gives an inclusive, though not an exhaustive, definition and takes within its purview not only Civil and Criminal Courts, but also Revenue Courts, while excluding a Registrar or Sub-Registrar under the Indian Registration Act.

In dealing with the question which has been raised in the present appeal what we are required to determine is whether a proceeding before an Income-tax Officer which by virtue of the operation of section 37 (4) of the Act, must be held to be a judicial proceeding, under section 193, Indian Penal Code, is a proceeding in any Court under section 195, Criminal Procedure Code. Section 193 makes a distinction between offences committed in any judicial proceeding and those committed in proceedings other than a judicial proceeding, whereas section 195 (1) (b), Criminal Procedure Code, does not refer to judicial proceedings as such, but mentions proceedings in any Court. That is why the controversy between the parties in the present appeal lies within a very narrow compass. Can it be said that the proceeding which is a judicial proceeding under section 193, Indian Penal Code, must be held to be a proceeding in any Court under section 195 (1) (b), Criminal Procedure Code? It is on this aspect of the dispute that the arguments on both sides are fairly balanced.

In dealing with this question, it is unnecessary to consider what would have been the position of the Income-tax Officer acting under section 37 (1), (2) and (3), and what would have been the character of the proceedings taken before him if sub-section (4) had not been enacted. In *Jagannath Prasad v. The State of Uttar Pradesh*¹, it has been held by this Court that the Sales Tax Officer functioning under the U. P. Sales Tax Act, 1948 (XV of 1948) was not a Court within the meaning of section 195, Criminal Procedure Code, and so, it was not necessary for him to make a complaint for the prosecution of any person against whom it was alleged that he had committed an offence under section 471, Indian Penal Code. This decision would tend to indicate that in the absence of section 37 (4) it would have become necessary to hold that the Income-tax Officer acting under section 37 (1), (2) and (3),

would not be a Court under section 195, Criminal Procedure Code, and in that sense the provisions of section 195 could not have been attracted. This position is not disputed by Mr. Desai who appears for respondent No. 2.

He, however, contends that the provisions of section 37 (4) which have been inserted in the Act in 1956 makes all the difference, and according to him, this sub-section was added in order to make section 195 (1) (b), Criminal Procedure Code, applicable to the proceedings before the Income-tax Officer. On the other hand, the Additional Solicitor-General has strenuously argued that the purpose which the Legislature had in mind in inserting sub-section (4) in section 37 was merely to make the proceedings before the Income-tax Officer judicial proceedings within the meaning of section 193, Indian Penal Code, and not to make section 195 (1) (b), Criminal Procedure, Code, applicable to them. If the intention of the Legislature had been to take the proceedings before the Income-tax Officer within the mischief of the said section of the Criminal Procedure Code, the Legislature would have expressly said so in terms. The omission to refer to the relevant provisions of the Criminal Procedure Code in section 37 (4) is not accidental, but deliberate, and so, though the proceeding before the Income-tax Officer may be and has to be regarded as a judicial proceeding under section 193, Indian Penal Code, it cannot be said to be a proceeding before a Court, because the Income-tax Officer is not a Court.

In support of his argument, the Additional Solicitor-General has referred us to several statutes where the legislative intention to extend the provisions of section 195, Criminal Procedure Code, to specific proceedings has been carried out by making an express provision in that behalf. Section 23 of the Workmen's Compensation Act, 1923 (VIII of 1923) provides that the Commissioner shall have all the powers of a Civil Court for the purposes therein indicated, and by an amendment made in 1929, it further lays down that the Commissioner shall be deemed to be a civil Court for all the purposes of section 195 and Chapter 35 of the Code of Criminal Procedure. The argument is that where the Legislature wanted to extend the provisions of section 195, Criminal Procedure Code, to the proceedings before the Commissioner held under the Workmen's Compensation Act, it thought it necessary to make a specific and express provision in that behalf. A similar provision is contained in section 18 of the Payment of Wages Act, 1936 (IV of 1936). In the Industrial Disputes Act, 1947 (XIV of 1947), the position is similar to that in the case of the Workmen's Compensation Act; section 11 (4) confers on the authorities therein specified powers as are vested in a Civil Court in respect of the matter mentioned therein. In 1950, sub-section (8) was added to section 11 by which it was provided that every Labour Court, Tribunal or National Tribunal shall be deemed to be Civil Court for the purposes of sections 480 and 482 of the Code of Criminal Procedure. This scheme also shows, says the Additional Solicitor-General, that where the Legislature wants to make any Tribunal or authority a Court, it uses express and appropriate language in that behalf. Section 45 of the Administration of Evacuee Property Act, 1950 (XXXI of 1950) likewise confers powers of a Civil Court on the Custodian and expressly adds that the proceedings before him shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code, and the Custodian shall be deemed to be a Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure. The same provision is made by section 17 of the Evacuee Interest (Separation) Act, 1951 (LXIV of 1951), as well as by section 26 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (XLIV of 1954).

On the other hand, section 51 of the Administrator-General's Act, 1913 (III of 1913) provides that whoever, during any examination authorised by this Act, makes a false statement on oath knowingly, he shall be deemed to have intentionally given false evidence in a stage of a judicial proceeding. The argument is that in this case, the Legislature wanted to equate the proceedings under this Act with judicial proceedings under section 193, Indian Penal Code, and did not intend to make section 195, Criminal Procedure Code, applicable to them, because it does not make the authority under this Act a Court, or does not, in terms, extend the provisions

of the said section to the proceedings held before such an authority. The same comment has been made on the provisions of section 171-A (4) of the Sea Customs Act, 1878 (VIII of 1878). Thus presented, the argument is no doubt attractive and cannot be rejected as without any substance.

The expression "judicial proceeding" is not defined in the Indian Penal Code, but we have the definition of the said expression under section 4 (m) of the Criminal Procedure Code. Section 4 (m) provides that "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath. The expression "Court" is not defined either by the Criminal Procedure Code or the Indian Penal Code, though 'Court of Justice' is defined by section 20 of the latter Code as denoting a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially. Section 3 of the Evidence Act defines a "Court" as including all Judges and Magistrates and all persons except the Arbitrators legally authorised to take evidence. *Prima facie*, there is some force in the contention that it would not be reasonable to predicate about every judicial proceeding that it is a proceeding before a Court, and so, it is open to the appellant to urge that though the proceeding before the Income-tax Officer may be a judicial proceeding under section 193, Indian Penal Code, it would not follow that the said judicial proceeding is a proceeding in a Court as required by section 195 (1) (b), Criminal Procedure Code.

It is somewhat remarkable that though section 193, Indian Penal Code, refers to a judicial proceeding, section 195, Criminal Procedure Code, refers to a proceeding in any Court; it does not say a judicial proceeding in any Court. Mr. Desai contends that reading section 193, Indian Penal Code and section 195 (1) (b), Criminal Procedure Code, together, it would not be unreasonable to hold that proceedings which are judicial under the former, should be taken to be a proceedings in any Court under the latter. The whole basis of providing for a higher sentence in regard to offences committed at any stage of a judicial proceeding appears to be that the Legislature took the view that the said offences were more serious in character, and so, it distinguished the said offence from similar offences committed at any stage of other proceeding. The argument is that while providing for a higher sentence in respect of this more serious class of offences committed at any stage of judicial proceedings, the Legislature intended that there should be a safeguard in respect of complaints as regards the said offences and that safeguard is provided by section 195 (1) (b), Criminal Procedure Code. In other words, an offence which is treated as more serious by the first paragraph of section 193, Indian Penal Code, because it is an offence committed during the course of a judicial proceeding should be held to be an offence committed in any proceeding in any Court for the purpose of section 195 (1) (b) Criminal Procedure Code. On this argument, it is not necessary to consider whether the Income-tax Officer is a Court or not, for, in substance, the contention is that as soon as section 37 (4) of the Act was enacted, the proceedings before an Income-tax Officer become judicial proceedings for the purpose of section 193, Indian Penal Code and since they are classed under the first paragraph of the said section, they attract the protection of section 195 (1) (b), Criminal Procedure Code. In our opinion, there is considerable force in this argument, and, on the whole, we are inclined to prefer the construction suggested by Mr. Desai to that pressed before us by the learned Additional Solicitor-General.

It is true, the Additional Solicitor-General has mainly relied upon the relevant provisions of several statutes in support of his construction and in so far as it appears that certain provisions in some of the said statutes in terms extend the application of section 195, Criminal Procedure Code to the proceedings to which they relate, the argument does receive support; but we hesitate to hold that the omission to refer to section 195 (1) (b), Criminal Procedure Code, in section 37 (4) of the Act necessarily means that the intention of the Legislature in enacting section 37 (4) was merely and solely to provide for a higher sentence in regard to the offence under section 193, Indian Penal Code, if it was committed in proceedings before the Income-tax Officer.

It is plain that if the argument of the Additional Solicitor-General is accepted, the result would be that a complaint like the present can be made by any person and if the offence alleged is proved, the accused would be liable to receive higher penalty awardable under the first paragraph of section 193, Indian Penal Code, without the safeguard correspondingly provided by section 195 (1) (b), Criminal Procedure Code. Could it have been the intention of the Legislature in making the offence committed during the course of a proceeding before an Income-tax Officer more serious without affording a corresponding safeguard in respect of the complaints which can be made in that behalf? We are inclined to hold that the answer to this question must be in the negative. That is why after careful consideration, we have come to the conclusion that the view taken by the Bombay High Court should be upheld though for different reasons. Section 37 (4) of the Act makes the proceedings before the Income-tax Officer judicial proceedings under section 193, Indian Penal Code, and these judicial proceedings must be treated as proceedings in any Court for the purpose of section 195 (1) (b), Criminal Procedure Code. That, we think, would really carry out the intention of the Legislature in enacting section 37 (4) of the Act.

In this connection, there is another consideration which has weighed in our minds. We have already noticed that section 37 (4) makes the proceedings before the Income-tax Officer judicial proceeding within the meaning of section 228, Indian Penal Code. When we turn to the latter section, we notice that the said section deals with the offence of intentionally causing insult or interruption to public servant sitting in judicial proceeding. It is obvious that the offence with which section 228 deals is an offence committed against a public servant sitting in a judicial proceeding. This section is one of the sections mentioned in section 195 (1) (b), Criminal Procedure Code, and so, any complaint in respect of the offence alleged to have been committed under section 228, Indian Penal Code, has to be made by the Court in question. There can be little doubt that if a person offers an insult to a public servant sitting in a judicial proceeding, or causes interruption to him while he is so sitting at any stage of the judicial proceeding, the complaint has to proceed from the public servant himself; that is the effect of section 195 (1) (b), Criminal Procedure Code. Before section 37 (4) of the Act was enacted, an insult given to an Income-tax Officer or interruption caused to his proceedings whilst he was conducting his proceedings, would not have amounted to an offence under section 228, Indian Penal Code. Section 37(4) makes a proceeding before the Income-tax Officer a proceeding under section 228, Indian Penal Code, and thus, an interruption in his proceedings, or an insult given to him, has now become punishable under the said section. Could it have been intended by the Legislature in enacting section 37 (4) that whereas an insult offered to a public servant acting judicially, or interruption caused in his proceedings would normally be cognizable only on the complaint of the public servant himself, the same offence, if committed in respect of the proceedings before an Income-tax Officer, should be cognizable at the complaint of a private party? The anomaly which would result if the construction suggested by the Additional Solicitor-General is accepted, is, in our opinion, so glaring that the alternative contention urged by Mr. Desai and upheld by the Bombay High Court which avoids the said anomaly appears to be more reasonable and more consistent with the true intention of the Legislature. That is why we are not prepared to accept the appellant's argument that the Bombay High Court was in error in dismissing his complaint on the ground that the condition precedent prescribed by section 195 (1) (b), Criminal Procedure Code, had not been complied with as no complaint had been filed by the Income-tax Officer.

It appears that in *In re Purnam Chand Maneklal*¹, the Full Bench of the Bombay High Court had taken the view that an Income-tax Collector is a Revenue Court within the meaning of that term as used in clauses (b) and (c) of section 195, Criminal Procedure Code, 1898. Scott, C.J., who spoke for the Full Bench, observed that it could not be contended that the Income-tax Collector was a Civil or Criminal Court, and so, he addressed himself to the narrow question as to whether he was a Revenue

Court. Dealing with the question on that footing, he examined the functions of the Income-tax Collector under Act II of 1886, and held that he was a Revenue Court. He rejected the contention that he could be treated as a Registrar or Sub-Registrar under the Registration Act, and so, he found no difficulty in coming to the conclusion that he was a Revenue Court. The Bombay High Court in the present case has substantially based itself on this decision in reversing the conclusion of the Presidency Magistrate and directing that the complaint filed by the appellant should be dismissed. It is unnecessary to consider whether the view taken by the Full Bench in *In re Punam Chand Maneklal*¹, is right, because the relevant provisions of the Income-tax Act have been subsequently modified in 1922 and different considerations have now assumed importance. It is no longer possible to hold that the Income-tax Officer is a Revenue Court, and, indeed that has not been the contention raised before us by Mr. Desai.

In the result, the appeal fails and is dismissed.

Das Gupta, J. (on behalf of *Sarkar, J.* and himself).—Is an Income-tax Officer under the Indian Income-tax Act, 1922, a Court within the meaning of clause (b) in sub-section (1) of section 195 of the Code of Criminal Procedure? That is the short but difficult question that arises in this appeal against a decision of the High Court of Judicature at Bombay. On 24th November, 1949, the appellant filed a complaint in the Court of the Presidency Magistrate, Bombay, alleging that when the respondent Mulji Manilal Kamdar was examined on commission by the Income-tax Officer, Jamnagar Circle, Jamnagar, he gave answers which were false to his knowledge. He prayed for the issue of process against the said Mulji Manilal Kamdar, so that he might be dealt with according to law. An objection was raised by the accused that in the absence of a complaint by the Income-tax Officer before whom the false statement was alleged to have been made the Magistrate was debarred from taking cognizance of the case. This contention was based on a submission that the Income-tax Officer was a Court within the meaning of section 195 (1) (b). This objection was rejected by the Presidency Magistrate. The High Court of Bombay was moved against the Presidency Magistrate's order. But considering itself bound by a Full Bench decision of the Court in *In re Punam Chand Maneklal*¹, and the later decision in *State v. Nemchand Peshvir*², the High Court held that an Income-tax Officer when holding proceedings under section 23 of the Income-tax Act, 1922, is a Revenue Court within the meaning of clause (b) in sub-section (1) of section 195 of the Code of Criminal Procedure. The correctness of the High Court's view is challenged before us by the complainant on the strength of a certificate granted by the High Court under Article 134 (1) (c) of the Constitution.

Section 195 (1) (b) is one of the group of sections in the Code of Criminal Procedure which have laid down exceptions to the general rule of criminal law that criminal proceedings can be instituted in a Court by any person. To this rule section 195 along with sections 196, 196-A, 197, 197-A, 198, 198-A and 199 provide exceptions. Section 195 mentions in its first sub-section a number of offences of which no Court shall take cognizance except on the complaint in writing of the persons as indicated. Three classes of offences are dealt with in the three clauses (a), (b), and (c) of this sub-section. Section 195 (1) (a) deals with offences punishable under sections 172 to 188 of the Indian Penal Code and provides that no Court shall take cognizance of any of these except on the complaint in writing "of the public servant" concerned or of some other public servant to whom he is subordinate. Section 195 (1) (b) deals with offences punishable under sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228 and provides that when any such offence is alleged to have been committed in or in relation to any proceeding in any Court, no Court shall take cognizance of it except on the complaint in writing of such Court or some other Court to which such Court is subordinate. Section 195 (1) (c) deals with offences punishable under sections 463, 471, 475 and 476 and provides that when any such offence is alleged to have been committed by a party to any proceeding

1. (1914) I.L.R. 38 Bom. 642 (F.B.).

2. (1955) 57 Bom.L.R. 1056.

in any Court in respect of any document produced or given in evidence in such proceeding, no Court shall take cognizance of the same except on the complaint in writing of such Court, or some other Court to which such Court is subordinate.

The second sub-section of section 195 runs thus :—

— “In clauses (b) and (c) of sub-section (1), the term “Court” includes a Civil, Revenue or Criminal Court, but does not include a Registrar, or Sub-Registrar, under the Indian Registration Act, 1877.”

In this appeal we are concerned directly with clause (b) of section 195 (1). The appellant's complaint before the Magistrate alleged the commission of an offence under section 193 of the Indian Penal Code in the course of the examination on oath by the Income-tax Officer, Ward A, Jamnagar Circle, Jamnagar. The examination itself took place in relation to assessment proceedings against the complainant for the years 1949-50, and 1950-51. If the Income-tax Officer is a Court it necessarily follows that the Magistrate was not entitled to take cognizance of this offence except on the complaint of the Income-tax Officer. That is how the question whether the Income-tax Officer is a Court or not falls to be considered.

Section 5 of the Income-tax Act, 1922 mentions six classes of Income-tax Authorities for the purposes of the Act. The primary function of an Income-tax Officer is the assessment of income that is chargeable to tax under section 3 of the Act, and the determination of the tax payable on it. He has to perform other functions under the Act that are subsidiary and ancillary to this main function. Under section 5 (7) the Income-tax Officers are subordinate to the Director of Inspection, the Commissioner of Income-tax and the Inspecting Assistant Commissioner of Income-tax within whose jurisdiction they perform their functions. Under section 5 (8) they have to observe and follow the orders, instructions and directions of the Central Board of Revenue. Chapter III of the Act in its several sections state what heads of income—profits and gains shall be chargeable to income-tax and indicates the duties which the Income-tax Officer has to perform for the purpose of his main function of assessing the chargeable income. For instance, deduction under section 7 (2) (ii) (a) in respect of conveyance owned by the assessee or used by him for the purpose of his employment “shall be such sum as the Income-tax Officer may estimate.....” The allowances permissible under section 10 (2) (i) “shall be such sum as the Income-tax Officer may determine”; the allowances under section 10 (2) (ix) also shall be such sum in respect of loans made in the ordinary course of business as the Income-tax Officer may estimate to be irrecoverable. Again, the allowances mentioned in clause (a) and clause (b) of section 10 (4) cannot be made “if in the opinion of the Income-tax Officer any such allowance is excessive or unreasonable.” The proviso to section 10 (5) requires the Income-tax Officer to satisfy himself in the cases dealt with there whether the main purpose of the transfer of assets was the reduction of liability to income-tax and provides that where he is so satisfied the actual cost of the assets shall be such amount as the Income-tax Officer may determine. Other sections showing the different matters in which the Income-tax Officer has to be satisfied or to form an opinion for the purpose of assessment are sections 12 (a), 13 and 17. Chapter IV of the Act which lays down the procedure to be followed in making the assessment, imposes *inter alia* the duty of calling for returns of income; (section 22); of making assessment of the income and to determine the sum payable by the assessee (section 23); the power to assess Companies to super-tax (section 23-A); the power to make provisional assessment in advance of regular assessment (section 23-B). It is obvious however that for carrying out these several functions properly it is necessary for the Income-tax Officer to examine documents and persons. Powers for this purpose are conferred on the Income-tax Officer (and certain other Income-tax Authorities) in section 37 of the Act. The first sub-section of section 37 runs thus :—

“The Income-tax Officer, Appellate Assistant Commissioner, Commissioner and Appellate Tribunal shall, for the purposes of this Act, have the same powers as are vested in a Court under the Code of Civil Procedure (V of 1908) when trying a suit in respect of the following matters, namely :—

- (a) discovery and inspection ;
- (b) enforcing the attendance of any person, including any officer of a banking company, and examining him on oath ;
- (c) compelling the production of books of account and other documents ; and
- (d) issuing summons."

The second sub-section empowers any Income-tax Officer specially authorised by the Commissioner to enter and search any building and seize books of account and other documents. Under the third sub-section the Income-tax Officer may impound or retain the books of account and other documents after following certain procedure. The fourth sub-section of this section which does not confer any powers but has been relied on strongly by the respondent will be dealt with in full detail later in this Judgment.

From the brief summary of the Income-tax Officer's functions given above it is clear that he is a part and parcel of the executive organ of the State. The fact that for carrying out some of these executive functions he will have the powers as are vested in a Court under the Code of Civil Procedure has not the effect of converting him into a limb of the judicial organ. It has been held that he is a quasi-judicial authority. That is not sufficient however to make him a Court. Before we can call him a Court, he must be shown to be a part of the judicial organ of the State. Leaving out for later consideration the effect of section 37 (4) it is clear that an Income-tax Officer is not a Court.

We have not thought it necessary to refer to the numerous decisions of the High Courts in India, of this Court or of the Privy Council in which the question of what is a Court has been considered. We have considered this unnecessary in view especially of the fact that most of these were noticed in a recent decision of this Court in *Jagannath Prasad v. State of Uttar Pradesh*¹, where the question whether a Sales Tax Officer was a Court or not within the meaning of section 195 (2) of the Criminal Procedure Code was considered. This Court held that the Sales Tax Officer is not a Court within the meaning of that section. All the reasons set out in this judgment which Kapur, J., delivered for the Court are applicable to the case of the Income-tax Officer and if the reasoning in that case is taken to be correct, as it must be, the Income-tax Officer also must be held to be not a Court—unless any different conclusion is justified from the provisions of section 37 (4) of the Act.

It will not be out of place to mention here what the Constitution Bench of this Court said in *Jaswant Sugar Mills v. Lakshmi Chand*², as regards the nature of the functions of income-tax Officers. The question for the Court's decision in that case was whether a Conciliation Officer under clause 29 of the Government Order under sections 3 and 8 of the U. P. Industrial Disputes Act was a "Tribunal" within the meaning of Article 136 of the Constitution and the Court held that it was not such a tribunal. As illustrations of other authorities whose primary functions is administrative even though they have the duty to act judicially, Shah, J., speaking for the Court said :—

"The duty to act judicially imposed upon an authority by statute does not necessarily clothe the authority with the judicial power of the State. Even administrative or executive authorities are often by virtue of their constitution, required to act judicially in dealing with questions affecting the rights of citizens. Boards of Revenue, Customs Authorities, Motor Vehicles Authorities, Income-tax and Sales Tax Officers are illustrations *prima facie* of such administrative authorities, who though under a duty to act judicially, either by the express provisions of the statutes constituting them or by the rules framed thereunder or by the implication either of the statutes or the powers conferred upon them are still not delegates of the judicial power of the State. Their primary function is administrative and, not judicial."

It is true that the question whether an Income-tax Officer was a Court or a tribunal was not directly for decision in *Jaswant Sugar Mills Case*². It is clear however that as a part of the reasoning which the Court applied for coming to the con-

1. (1963) 2 S.C.J. 120: (1963) 2 S.C.R. 850: 2. A.I.R. 1963 S.C. 677.
(1963) M.L.J. (Cr.) 338: A.I.R. 1963 S.C. 416.

clusion that the Conciliation Officer is not a Tribunal this Court was of opinion that an Income-tax Officer is also not a "Tribunal". Obviously, if it is not even a Tribunal it cannot be a Court.

It is not seriously disputed by Mr. Desai who appeared before us for the respondent that looking at the functions of an Income-tax Officer it is not possible to say that the Income-tax Officer is a Court especially after this Court's decision in *Jagamath Prasad's case*¹ mentioned above. His main contention is that even though the Income-tax Officer was not originally a Court within the meaning of section 195 of the Code of Criminal Procedure, the deeming provision in section 37 (4) has made him a Court. Section 37 (4) runs thus :—

"Any proceeding before any authority referred to in this section shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code (XLV of 1860.)"

The authorities mentioned in the section are the Income-tax Officer, the Appellate Assistant Commissioner, Commissioner and the Appellate Tribunal. The direct effect of sub-section (4) of section 37 therefore is that proceedings before an Income-tax Officer "shall be deemed to be a judicial proceeding" within the meaning of section 193 and section 228 and for the purposes of section 196 of the Indian Penal Code. As we read the section it at once leads to the eye that there is no mention in this of section 195 of the Code of Criminal Procedure. In introducing this deeming provision in 1956 Parliament did not think it necessary to extend the deeming provision for the purpose of section 195. If Parliament intended this provision to produce the consequence that the authorities, in the section should be deemed to be a Court within the meaning of section 195 (2) of the Code of Criminal Procedure, it is reasonable to expect that the Parliament would have added the words "and shall be deemed to be a Court within the meaning of section 195 (2) of the Code of Criminal Procedure" or "shall be deemed to be a Court for the purpose of section 195 of the Code of Criminal Procedure" or some similar phraseology. The omission to use any such words is all the more remarkable when we notice that on several occasions before 1956 Parliament had in expressing an intention that a particular authority should be a Court for the purpose of section 195 added express words to give effect to that intention.

Thus, in the Payment of Wages Act, which was enacted in 1936, section 18 after stating that every authority appointed under sub-section (1) of section 15 shall have all the powers of a civil Court under the Code of Civil Procedure for certain purposes proceeded to say that "every such authority shall be deemed to be a civil Court for the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898". Again, in section 23 of the Workmen's Compensation Act which confers on the Commissioner for Workmen's Compensation all the powers of a civil Court under the Code of Civil Procedure, 1908, the Legislature added in 1929 the following words:

"and the Commissioner shall be deemed to be a civil Court for all the purposes of section 195 and of Chapter XXXV of the Code of Criminal Procedure, 1898."

It is worth noticing also that in several other statutes Parliament after stating that certain proceeding shall be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code proceeded to say that for certain purposes it shall also be deemed to be a Court. The Evacuee Property Act of 1950 after stating that the enquiry by the Custodian shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, goes on to say "and the Custodian shall be deemed to be a Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898". Another instance of similar legislation is to be found in section 17 of the Evacuee Interest (Separation) Act, 1951, which after stating that any proceeding before the competent officer or the appellate officer shall be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code adds

¹ (1963) 2 S.C.J. 120 : (1963) 2 S.C.R. 850 : (1963) M.L.J. (Cri.) 338 : A.I.R. 1963 S.C. 416.

"and the competent officer or the Appellate Officer shall be deemed to be a civil Court within the meaning of section 480 and section 482 of the Code of Criminal Procedure, 1898."

The Displaced Persons' (Compensation and Rehabilitation) Act, 1954, uses exactly similar words in section 26. That section first confers on every officer appointed under the Act the same powers in respect of certain specified matters for the purpose of making any enquiry or hearing any appeal under the Act as are vested in a civil Court under the Code of Civil Procedure and then proceeds thus

"any proceeding before any such officer shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code and every such Officer shall be deemed to be a civil Court within the meaning of sections 470 and 482 of the Code of Criminal Procedure, 1898".

Similarly, the Industrial Disputes Act, 1947, after providing in sub-section (3) of section 11 that every enquiry or investigation by a Board, Court, Labour Court, Tribunal or National Tribunal, shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code adds in sub-section (8) of the same section the provision that

"every Labour Court, Tribunal or National Tribunal shall be deemed to be a civil Court for the purposes of section 480 and section 482 of the Code of Criminal Procedure, 1898."

This sub-section was added in 1950.

In clear contrast with these are the statutes which after saying that certain proceedings shall be a judicial proceeding refrain from adding that the authority will be deemed to be a Court. One such statute is the Sea Customs Act, which in section 171-A (4) lays down that every enquiry under that section shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code and stops there. A somewhat similar provision, though in different phraseology appears in section 51 of the Administrator-General's Act (III of 1915) which runs thus :—

"Whoever, during any examination authorised by this Act, makes upon oath a statement which is false and which he either knows or believes to be false or does not believe to be true, shall be deemed to have intentionally given false evidence in a stage of a judicial proceedings."

The learned Solicitor-General, who appeared before us on behalf of the appellant, strongly urged that if the intention of the Legislature had ever been that the Income-tax Officer or the other authorities mentioned in section 37 should be deemed to be a Court for the purpose of section 195 of the Code of Criminal Procedure it would have taken care to express that intention in clear phraseology. In any case, argues learned Counsel, when in 1956 the old section 37 was wholly recast the Parliament which at least then had before it a well established pattern of legislative forms in the numerous statutes mentioned above for expressing an intention that an authority shall be deemed to be a Court for the purpose of section 195 or any other provision of the Code of Criminal Procedure there could be no conceivable reason for the failure to follow that pattern. In our opinion, there is considerable force in this argument.

On behalf of the accused-respondent, Mr. Desai suggests that the words actually used, viz., "that proceeding before the authority shall be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code" were by themselves sufficient to give effect to an intention that that authority shall also be deemed to be a Court within the meaning of section 195 of the Code of Criminal Procedure. According to the learned Counsel, a judicial proceeding within the meaning of section 193 of the Indian Penal Code can only be before a Court. For this proposition we can find no support either in principle or authority. It seems clear to us on the contrary that proceedings before tribunals which are quasi-judicial and not a Court may well be considered to be judicial proceedings within the meaning of section 193 of the Indian Penal Code. Though the words "judicial proceedings" have been used in numerous sections of the Indian Penal Code, it has not defined the words, though the words "Court of justice" as also the words "a judge" have been defined. The Code of Criminal Procedure in which also the phrase "judicial

proceeding" occurs in several sections has defined it in section 4 (m) thus. "Judicial proceedings includes any proceedings in the course of which evidence is or may be legally taken on oath". This definition of judicial proceeding was included in the Code of Criminal Procedure, 1898, from the very beginning. The fact that for all these years since 1898 Parliament has not thought fit to give any definition of the words "judicial proceeding" in the Indian Penal Code is some justification for thinking that the words "Judicial proceeding" in the Indian Penal Code may reasonably be held to have the same meaning as in the Code of Criminal Procedure. In other words, it would be reasonable to think that in the Indian Penal Code also the words "judicial proceeding" has been used to include "any proceeding in the course of which evidence is or may be legally taken on oath." That would bring within the meaning of the words "judicial proceeding" proceeding before many quasi-judicial authorities which are not Court, e.g., a Customs Officer or a Sales Tax Officer.

It is unnecessary for our present purpose to attempt an exact definition of the words "judicial proceeding" as used in section 193 or in any other section of the Indian Penal Code. Even without any such definition however it appears clear that the phrase "judicial proceeding" is wide enough to include not only proceeding before Courts but proceedings before certain other tribunals. It is pertinent to point out that if a proceeding before any other authority except a Court could not be a judicial proceeding within the meaning of section 193 of the Indian Penal Code, it would not have been necessary for Parliament in the Evacuee Property Act, 1950, in the Evacuee Interest (Separation) Act, 1950, and in the Displaced Persons' (Compensation and Rehabilitation) Act, 1954, to add after laying down that the proceedings before certain authorities shall be judicial proceedings within the meaning of section 193 and section 228 of the Indian Penal Code, the further words, that "the authority shall be deemed to be a civil Court" for certain purposes of the Code of Criminal Procedure. It is especially interesting to note in this connection the provisions of section 11 (3) and section 11 (8) of the Industrial Disputes Act to which we have already referred. Under section 11 (3) as originally enacted every enquiry or investigation by a Board, Court or Tribunal shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code. When Parliament added to this section sub-section (8) what was enacted was that every tribunal shall be deemed to be a civil Court for the purpose of section 480 and section 482, Criminal Procedure Code, 1898. After the amendment by the Act (XXXVI) of 1956 the concluding portion of section 11 (3) ran thus:—

"Every enquiry or investigation by a Board, Court, Labour Court, Tribunal or National Tribunal shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code."

The same Act substituted in section 8 the words "Labour Court, Tribunal or National Tribunal" for the words "Tribunal". In spite of the fact however that every enquiry or investigation by a Board has to be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code Parliament refrained from saying that a Board shall also be deemed to be a civil Court for the purpose of section 480 and section 482 of the Code of Criminal Procedure. This emphasises the fact that the Legislature did not think that the necessary effect of legislating that a proceeding before an authority shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code would be that that authority shall also be deemed to be a Court. To say now that the Legislature in providing in section 37 (4) of the Indian Income-tax Act that a proceeding before the specified authorities shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, intended also to say that such authority shall be deemed to be a Court within the meaning of section 195 of the Code of Criminal Procedure would be to impute to the Legislature an intention of which it itself had no knowledge.

Learned Counsel for the accused-respondent then drew our attention to the use of the words "judicial proceeding" in section 476 and section 479-A of the Code of Criminal Procedure and argued that in these sections the words "judicial

proceeding" have been used as equivalent to proceeding in a Court. That may well be so. Section 476 lays down the procedure in cases mentioned in section 195 (1) (b) and (c) of offences that appear to have been committed in or in relation to a proceeding in a Court. It was quite correct therefore to refer to such proceeding in a later part of the section as judicial proceeding. Section 479-A lays down the procedure in certain cases of offences of giving false evidence in civil, revenue or criminal Courts and necessarily speaks of the proceedings before these Courts as judicial proceeding. It is difficult to see how the use of the words "judicial proceeding" in these sections support the contention that "judicial proceeding" can only be a proceeding before a Court. There can no doubt that every proceeding before a Court is a "judicial proceeding." It does not follow however that every judicial proceeding is a proceeding before a Court.

Mr. Desai drew a grim picture of what would happen if the authority a proceeding before which was deemed to be a judicial proceeding within the meaning of section 228 of the Indian Penal Code was not at the same time considered a Court within the meaning of section 195. He rightly points out that one consequence will be that if any person offers any insult or cause any obstruction to a public servant when he is sitting in any such judicial proceeding and thus commits an offence under section 228 of the Indian Penal Code it will be possible for persons other than the public servants to institute a criminal case for such offence. This, says the learned Counsel, would be a very undesirable thing. We fail to see why this should be considered to be undesirable. But assuming this is so, that is not to our mind a consideration which should compel us to give the words "judicial proceeding" a meaning which they do not bear.

It may be mentioned here, as already stated, that under section 171-A (4) of the Sea Customs Act, 1874, every enquiry before a Customs Officer "shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code". In spite of this, the Constitution Bench of this Court held in its recent decision in *Indo-China Steam Navigation Co., Ltd. v. The Additional Collector of Customs*¹, that a Customs Officer is not even a Tribunal. After discussing several previous decisions of this Court Gajendragadkar, C.J., speaking for the Court observed thus :—

"The result therefore is that it is no longer open to doubt that the Customs Officer is not a Court or tribunal."

It is difficult to see how if the presence of the words "shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code" in section 171-A (4) have not the effect of making a Customs Officer a Court or tribunal, the presence of similar words in section 37 (4) in the Indian Income-tax Act, can have that effect.

In our opinion, the words used in section 37 (4) of the Income-tax Act furnish no reason to alter the legal position that is inescapable on a consideration of the functions of the Income-tax Officer that he is not a Court within the meaning of section 195 of the Code of Criminal Procedure.

We would therefore allow the appeal, set aside the order passed by the High Court and direct that the Presidency Magistrate, Bombay, should now dispose of the case in accordance with law.

ORDER.—In accordance with the opinion of the majority, this appeal fails and is dismissed.

V. B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—P. B. GAJENDRAGADKAR, C.J., K. N. WANCHOO, J. C. SHAH,
N. RAJAGOPALA AYYANGAR AND S. M. SIKRI, JJ.

.. Appellant*

The State of Madhya Pradesh

v.

.. Respondent.

The Bhopal Sugar Industries, Ltd.

Bhopal State Agricultural Income-tax Act (IX of 1953).—Levy of Agricultural Income-tax in former Part C State—Incorporation of Part C State into a bigger State and under Reorganisation Act—Continuance of Agricultural Income-tax law in former regions of Part C State—No such law in the other regions of bigger State—If violates equal protection clause—Temporary legislation and equality—Principles—Taxation law—Classification for—Reasonableness—Principles—Constitution of India (1950), Article 14.

A company incorporated in the Part C State of Bhopal, was assessed to tax on its agricultural income under the Bhopal Agricultural Income-tax Act (IX of 1953). The territory of Bhopal was incorporated into the newly formed States of Madhya Pradesh by the State Reorganisation Act (LXVI of 1956) from 1st November, 1956. By the Madhya Pradesh Adaptation of Laws (State and Current Subjects) Order, 1956, the Bhopal Act (IX of 1953) continued to remain in force in the former territories of Part C State of Bhopal only, in the State of Madhya Pradesh. It was common ground that in the remaining territories of the State of Madhya Pradesh there was no law providing for levy of tax on agricultural income. The company filed a petition under Articles 226 of the Constitution seeking to restrain the State of Madhya Pradesh from enforcing the Bhopal Act (IX of 1954) as it violated Article 14 of the Constitution. The High Court issued a writ and the State of Madhya Pradesh appealed.

Held :—A plea of differential treatment is by itself not sufficient to make out a case of denial of the equal protection of laws under Article 14 of the Constitution. An applicant pleading that equal protection of laws has been denied to him must make out that only he had been treated differently from others but he has been so treated from persons similarly circumstanced without reasonable basis and such differential treatment is unjustifiably made.

The Legislature has always the power to make special laws to attain particular objects and for that purpose has authority to select or classify persons, objects, or transactions upon which the law is intended to operate. Differential treatment becomes unlawful only when it is arbitrary or not supported by a rational relation with the object of the statute. Where application of unequal laws is reasonably justified for historical reasons, a geographical classification founded on those historical reasons would be upheld.

In adjudging the reasonableness of classification for the purpose of taxation, the Courts recognise greater freedom in the Legislature and if the statute discloses a permissible policy of taxation the Courts will uphold it. The Courts undoubtedly lean more readily in favour of the presumption of constitutionality of a taxing statute, but that is not to say that they will not strike down a statute unless it appears that the tax was imposed deliberately with the object of differentiating between persons similarly circumstanced.

Section 119 of Act (LXVII of 1956) was intended to serve a temporary purpose. Continuance of the laws of the old region after the reorganisation under the section was by itself no discriminatory even though it resulted in differential treatment of persons, objects or transactions in the new State, because it was intended to serve a dual purpose, facilitating the early formation of homogeneous units in the larger interests of the Indian Union and maintaining, even while merging, its political identity in the new unit, the distinctive character of each region, till uniformity of laws was secured in those branches in which it was expedient after full enquiry to do so. The laws of the region merged in the new units had therefore to be continued on grounds of necessity and expediency.

But a purely temporary provision which because of compelling forces justified differential treatment, when the Reorganisation Act was enacted cannot obviously be permitted to assume permanency so as to perpetuate, that treatment without a rational basis to support it after the initial expediency and necessity have disappeared.

It would be impossible to lay down any definite time-limit within which the State had to make necessary adjustments so as to effectuate the equality clause of the Constitution.

The assumption made by the company that by allowing the Bhopal Act to operate without any modification, the State had violated Article 14 and the assumption made by the State that if the Act in operation in a region incorporated in the new State was not discriminatory at the date of the reorganization, it can never become discriminatory thereafter are both erroneous.

An enquiry, by the High Court would be necessary, into the structure of tax burden imposed directly or indirectly on or in respect of agricultural land or income from it in the different regions constituting the State. If for instance, on account of disparity in the impost of land revenue and

19th February, 1964.

related taxes on land and income from land in other regions, the ultimate burden on persons in the Bhopal region who were subjected to agricultural income-tax and agricultural land owners in the rest of the State did not disclose a pattern of wide variations, the mere existence of agricultural income impost in one region, and the absence of such impost in another region may not necessarily justify an inference of unlawful discrimination.

Appeal from the Judgment and Order dated 17th January, 1961 of the Madhya Pradesh High Court in Misc. Petition No. 226 of 1960.

B. Sen, Senior Advocate (*I. N. Shroff*, Advocate, with him), for Appellant.

S. T. Desai, Senior Advocate (*J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—Bhopal Sugar Industries Ltd.—hereinafter called ‘the Company’—was incorporated under the Companies Act of the former Indian State of Bhopal. In 1953 the State of Bhopal which was then a Part ‘C’ State under the Constitution of India enacted “The Bhopal State Agricultural Income-tax Act (IX of 1953)” providing for imposition and levy of tax on agricultural income. The Act was applied to the territory of the entire State of Bhopal and was brought into force on 15th July, 1953.

By the States Reorganisation Act (LXVII of 1956) territory of the Part ‘C’ State of Bhopal was incorporated with effect from 1st November, 1956, into the newly formed State of Madhya Pradesh. Section 119 of the States Reorganisation Act, 1956, enacted that by the constitution of the reorganized State, no change in the laws in force which immediately before 1st November, 1956, extended or applied to any constituent regions, was effected, and territorial references in the laws to an existing State shall, until otherwise provided by a competent Legislature or other competent authority be construed as meaning the territories within that State immediately before 1st November, 1956. By the Madhya Pradesh Adaptation of Laws (State and Concurrent Subjects) Order, 1956, promulgated by the Government of the State, all laws in force in the regions which were newly incorporated into the reorganised State of Madhya Pradesh were, with certain adaptations and modifications specified in the Order, to remain in force in those areas until altered, repealed or amended, and by that Order the Bhopal Act, (IX of 1953) continued to remain applicable in the territory of the former Bhopal State, in the new State of Madhya Pradesh. Later the Legislature of the Madhya Pradesh State enacted the Madhya Pradesh Extension of Laws Act, 1958, extending several Acts—Central as well as State—to the entire territory of the State, but no alteration was made in the territorial operation of Bhopal Act (IX of 1953). It is common ground that in the remaining territory of the State of Madhya Pradesh there was no law providing for levy of tax on agricultural income.

The Company paid and continued to pay tax assessed under the Bhopal State Agricultural Income-tax Act, 1953, till sometime in 1960. On 4th August, 1960, the Company presented a petition under Article 226 of the Constitution in the High Court of Madhya Pradesh at Jabalpur for a writ declaring that Bhopal Act (IX of 1953) was unconstitutional and void as being discriminatory and for appropriate directions, writs or orders restraining the State of Madhya Pradesh from giving effect to the Act. It was claimed by the Company that Bhopal Act (IX of 1953) deprived the residents of the territory to which it applied, of the protection of Article 14 of the Constitution. The High Court upheld the plea of the Company and issued a writ restraining the State of Madhya Pradesh from enforcing the provisions of Bhopal Act (IX of 1953), observing that the Act was “in clear contravention of the petitioner’s right under Article 14 of the Constitution and must be declared void”.

Authority of the Part ‘C’ State of Bhopal to enact the Act, as it originally stood, is not in dispute, nor are the provisions of section 119 of the States Reorganisation Act and the Madhya Pradesh Adaptation of Laws (State and Concurrent Subjects) Order, 1956, challenged as incompetent. The plea that there is infringement of Article 14 of the Constitution is advanced on the sole ground that in the reorganized

State of Madhya Pradesh formed under the States Reorganisation Act, 1956, agricultural income-tax is levied within the territory of the former State of Bhopal and not in the rest of the territories of Madhya Pradesh. *Prima facie*, a differential treatment is accorded by the State of Madhya Pradesh to persons carrying on agricultural operations in the Bhopal region, because the State subjects them to pay tax on agricultural income, which is not imposed upon agricultural income earned in the rest of the State. But that by itself cannot be a ground for declaring the Act *ultra vires*. The State is undoubtedly enjoined by Article 14 of the Constitution not to deny to any person equal protection of the laws within the territory, but a proper classification bearing a reasonable and just relation to the object sought to be achieved by the statute does not on that account become impermissible. All persons who are similarly circumstanced as regards a subject-matter are entitled to equal protection of the laws, but it is not predicated thereby that every law must have universal application irrespective of dissimilarity of objects or transactions to which it applies, or of the nature or attainments of the persons to whom it relates. The Legislature has always the power to make special laws to attain particular objects and for that purpose has authority to select or classify persons, objects or transactions upon which the law is intended to operate. Differential treatment becomes unlawful only when it is arbitrary or not supported by a rational relation with the object of the statute. This Court has held in several cases, that where application of unequal laws is reasonably justified for historical reasons, a geographical classification founded on those historical reasons would be upheld: *Bhaiyalal Shukla v. State of Madhya Pradesh*,¹ *The State of Madhya Pradesh v. The Gwalior Sugar Co., Ltd. and others*,² *Maharaj Kumar Prithvi Raj and another v. The State of Rajasthan and others*³ and *Anand Pradesh Lakshminivas Ganerival v. State of Andhra Pradesh*.⁴ The decision of this Court in *The State of Rajasthan v. Rao Manohar Singhji*,⁵ does not lay down any contrary principle. In that case the Court accepted that historical reasons may justify differential treatment of separate geographical regions provided it bears a reasonable and just relation to the matter in respect of which it is proposed, but the differentiation in that case was regarded as infringing the equal protection of the laws because members of the same class were treated in a manner *ex facie* discriminatory, and no attempt was made by the State to justify the treatment as founded upon a rational basis having a just relation to the impugned statute.

It is necessary to bear in mind that the various administrative units which existed in British India were the result of acquisition of territory by the East India Company from time to time. The merger of Indian States since 1947 brought into the Dominion of India numerous Unions or States, based upon arrangements *ad hoc*, and the constitutional set up in 1950 did not attempt, on account of diverse reasons, mainly political, to make any rational rearrangement of administrative units. Under the Constitution as originally promulgated there existed three categories of States, beside the Centrally administered units of the Andamans Nicobar islands. Part 'A' States were the former Governors' Provinces, with which were merged certain territories of the former Indian States to make geographically homogeneous units: Part 'B' States represented groups formed out of 275 bigger Indian States by mutual arrangement into Unions; Part 'C' States were the former Chief Commissioners' Provinces. These units were continued under the Constitution merely because they formerly existed. Later an attempt was made under the States Reorganisation Act to rationalize the pattern of administration by reducing the four classes of units into two—States and Union territories—and by making a majority of the States homogeneous linguistic units. But in the States so reorganised were incorporated regions governed by distinct laws, and by the mere process of bringing into existence reorganized administrative units, uniformity of laws could not immediately be secured. Administrative reorganisation evidently could not await

1. (1964) 1 S.C.J. 241: (1962) Suppl. 2 S.C.R. 257.
2. (1962) 2 S.C.R. 619.
3. C.A. Nos. 327, 328 of 1956, decided on 2nd November, 1960.
4. A.I.R. 1963 S.C. 853.
5. (1954) S.C.R. 996: (1954) S.C.J. 439.

adaptation of laws, so as to make them uniform, and immediate abolition of laws which gave distinctive character to the regions brought into the new units was politically inexpedient even if theoretically possible. An attempt to secure uniformity of laws before reorganisation of the units would also have considerably retarded the process of reorganisation. With the object of effectuating a swift transition, the States Reorganisation Act made a blanket provision in section 119 continuing the operation of the laws in force in the territories in which they were previously in force notwithstanding the territorial reorganisation into different administrative units until the competent Legislature or authority amended, altered or modified those laws.

The reorganized State of Madhya Pradesh was formed by combining territories of four different regions. Shortly after reorganisation, the Governor of the State issued the Madhya Pradesh Adaptation of Laws (State and Concurrent Subjects) Order, 1956, so as to make certain laws applicable uniformly to the entire State and later the Legislature by the Madhya Pradesh Extension of Laws Act, 1958, made other alterations in the laws applicable to the State. But Bhopal Act (IX of 1953) remained unamended and unaltered : nor was its operation extended to other areas or regions in the State. Continuance of the laws of the old region after the reorganisation by section 119 of the States Reorganisation Act was by itself not discriminatory even though it resulted in differential treatment of persons, objects and transactions in the new State, because it was intended to serve a dual purpose—facilitating the early formation of homogeneous units in the larger interest of the Union, and maintaining even while merging its political identity in the new unit, the distinctive character of each region, till uniformity of laws was secured in those branches in which it was expedient after full enquiry to do so. The laws of the regions merged in the new units had therefore to be continued on grounds of necessity and expediency. Section 119 of the States Reorganisation Act was intended to serve this temporary purpose, *viz.*, to enable the new units to consider the special circumstances of the diverse units, before launching upon a process of adaptation of laws so as to make them reasonably uniform, keeping in view the special needs of the component regions and administrative efficiency. Differential treatment arising out of the application of the laws so continued in different regions of the same reorganised State, did not therefore immediately attract the clause of the Constitution prohibiting discrimination. But by the passage of time, considerations of necessity and expediency would be obliterated, and the grounds which justified classification of geographical regions for historical reasons may cease to be valid. A purely temporary provision which because of compelling forces justified differential treatment when the Reorganisation Act was enacted cannot obviously be permitted to assume permanency, so as to perpetuate that treatment without a rational basis to support it after the initial expediency and necessity have disappeared.

The High Court observed that even though the State had enacted the Madhya Pradesh Extension of Laws Act, 1958, and had removed diversity in some of the laws of the component regions, no attempt was made to remove discrimination between the territory of the former Bhopal State and the rest of the territories of the State of Madhya Pradesh in the matter of levy of agricultural income-tax. This in the view of the High Court was unlawful because the State had since the enactment of the States Reorganisation Act sufficient time and opportunity to decide whether the continuance of the Bhopal State Agricultural Income-tax Act in the Bhopal region would be consistent with Article 14 of the Constitution. We are unable to agree with the view of the High Court so expressed. It would be impossible to lay down any definite time-limit within which the State had to make necessary adjustments so as to effectuate the equality clause of the Constitution. That initially there was a valid geographical classification of regions in the same State justifying unequal laws when the State was formed must be accepted. But whether the continuance of unequal laws by itself sustained the plea of unlawful discrimination in view of changed circumstances could only be ascertained after a full and thorough enquiry into the continuance of the grounds on which the inequality could rationally be

founded, and the change of circumstances, if any, which obliterated the compulsion of expediency and necessity existing at the time when the Reorganisation Act was enacted.

Unfortunately there was no clear perception by the parties of what has to be pleaded and proved to establish a plea of denial of equal protection of the laws. The Company merely assumed that the existence of a law relating to taxation which imposed agricultural income-tax in the Bhopal region, there being no similar levy in the rest of the State, was in law discriminatory. That is clear from the petition of the Company which merely asserted that the Act discriminated between the Company and other owners of sugarcane farms in the State of Madhya Pradesh, because it singled out the Company and other agriculturists in the Bhopal region from other agriculturists and sugarcane farm owners in the State of Madhya Pradesh and subjected them to liability without any reasonable basis for classification. The Company therefore baldly submitted that after the incorporation of the Bhopal region in the reorganised State, the State of Madhya Pradesh ought to have suitably modified the Act so as to make it applicable to all residents alike and by allowing the Act to operate without any modification, the State had violated the fundamental right of the Company under Article 14 of the Constitution. The State of Madhya Pradesh did not file any affidavit in reply before the High Court, and chose to defend the petition as if its decision depended on a pure question of law, that if for historical reasons the Act in operation in a region incorporated in the new State was not discriminatory at the date when the reorganisation took place, it can never become discriminatory thereafter. The assumptions made by both the parties appear to be erroneous. The High Court was of the view that after expiry of a reasonable period during which the State has the opportunity of making necessary adaptations so as to make the Act applicable to the entirety of the new State, if the State fails to adapt the law, historical considerations which initially justified the classification must be deemed to have disappeared. That assumption without further enquiry may not be accepted as correct. It was necessary for the High Court to investigate whether at the date when the petition was filed, special treatment of the Bhopal region in the matter of levy of agricultural income-tax had a rational basis. That necessitated an enquiry into the structure of tax burden imposed directly or indirectly on or in respect of agricultural land or income from it in the different regions constituting the State. If for instance, on account of disparity in the impost of land revenue and related taxes on land and income from land in other regions, the ultimate burden on persons in the Bhopal region who were subjected to agricultural income-tax and agricultural land owners in the rest of the State did not disclose a pattern of wide variations, the mere existence of agricultural income impost in one region, and absence of such impost in another region may not necessarily justify an inference of unlawful discrimination. It was therefore necessary to ascertain the difference in the overall tax liability between persons similarly situated in the State of Madhya Pradesh in the matter of levy of agricultural tax. For that purpose an investigation was necessary whether the incidence of total burden on agriculturists was so disparate that an inference of unlawful discrimination may reasonably be made. The High Court had to ascertain the impact of diverse land taxes imposed on agricultural land in the four regions of the State, and whether the burden between persons similarly circumstanced was substantially dissimilar, and whether continuance of dissimilar levies was justified. If upon a thorough examination of the pattern of land taxes in different regions of the State, it appeared to the Court than an unreasonably larger burden was sought to be continued upon this region, without any apparently justifiable ground, an inference of discrimination may arise.

In adjudging reasonableness of classification for the purpose of taxation, the Courts recognise greater freedom in the Legislature and if the statute discloses a permissible policy of taxation, the Courts will uphold it. The Courts undoubtedly lean more readily in favour of the presumption of constitutionality of a taxing statute, but that is not to say that they will not strike down a statute unless it appears that

the tax was imposed deliberately with the object of differentiating between persons similarly circumstanced. We may state that the observations to the contrary that in matters of taxation a statute may not be struck down "unless the Court finds that" the tax "has been imposed with a deliberate intention of differentiating between individual and individual" in *The State of Madhya Pradesh v. The Gwalior Sugar Co., Ltd. and another*¹, was not strictly necessary for deciding that case, and was not intended to lay down any special test applicable to taxing statutes in their relation to Article 14 of the Constitution.

To arrive at a conclusion adverse to the State it was therefore necessary to decide whether the differentiation arising from the continuation of the levy of the agricultural income-tax was unfair and not supported by a reasonable standard, and the State having the requisite information and opportunity to make the imposts reasonably uniform, had failed or neglected to do so. No set formula can be devised for solving a problem of this character. It cannot be said that because a certain number of years have elapsed or that the State has made other laws uniform, the State has acted improperly in continuing an impost which operates upon a class of citizens more harshly than upon others.

The petition filed by the Company was singularly deficient in furnishing particulars which would justify the plea of infringement of Article 14 of the Constitution. It cannot be too strongly emphasized that to make out a case of denial of the equal protection of the laws under Article 14 of the Constitution, a plea of differential treatment is by itself not sufficient. An applicant pleading that equal protection of the laws has been denied to him must make out that not only he had been treated differently from others but he has been so treated from persons similarly circumstanced without any reasonable basis, and such differential treatment is unjustifiably made. A mere plea that the Company and other agriculturists within the region of the former Bhopal State had to pay the agricultural income-tax, whereas the agriculturists elsewhere had not to pay such tax, is not sufficient to make out a case of infringement of the fundamental right under Article 14 of the Constitution.

The State also did not place evidence before the High Court, which would in the very nature of things be in its possession, showing a rational relation between the differential treatment and the classification and has also not placed any material before the Court throwing light on the question whether the continuance of the tax was justified: it merely chose to plead its case as on a demurrer. Both the State and the Company have by inadequate appreciation of the true position in law contributed to the manner in which the trial of the petition has proceeded. We would in the circumstances not be justified in dismissing the petition on a technical view of the burden of proof. We think that this is a case in which the parties should be given an opportunity to plead their respective cases adequately and to go to trial after the requisite evidence which has a bearing is brought before the Court.

We accordingly allow the appeal, set aside the order and remand the case for re-trial to the High Court. The High Court, will, if the Company so desires, give opportunity to the Company to amend its petition so as to adequately plead its case of infringement of the fundamental right to equal protection of the laws supported by necessary particulars. The High Court will also give opportunity to the State to file its affidavit in reply and to place all such materials as it may rely upon the plea set up by the Company. After the pleadings are completed and the evidence is brought on the record, the High Court will proceed to decide the case according to law. Costs in this Court will be the costs in the petition before the High Court.

V. S.

Appeal allowed and remanded.

THE SUPREME COURT OF INDIA.

PRESENT :—P. B. GAJENDRAGADKAR, Chief Justice, K. N. WANCHOO,
K. C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Hukumchand Mills Ltd.

.. Appellant *

v.

.. Respondents.

State of Madhya Pradesh and Another

Indore Industrial Tax Rules, 1927—Rules 17 and 18—Notification of 28th December, 1949 by Madhya Bharat Government making amendments to the Rules—Vires—Mistake in Notification in citing rule 17 of the Indore Income-tax Rules instead of section 5 of the Madhya Bharat Act I of 1948 which validity conferred such power—Effect—Rule 13 of the Rules as amended by the Notification—limiting Second Appeals to questions of law—Validity.

Madhya Bharat Taxes on Income (Validation) Act (XXXVIII of 1954)—If offends Article 14 of the Constitution of India 1950.

The Madhya Bharat Government had the power under section 5 (1) and (3) of Madhya Bharat Act I of 1948 to amend the Indore Industrial Tax Rules (which was the law in force in the merged state of Holkar. The only mistake that the Government made was that in the opening part of the Notification section 5 of the Act was not referred to and the Notification did not specify that the Government was making a regulation under Act I of 1948. In the opening part of the Notification it was said that the amendments were made under rule 17 of the Indore Industrial Tax Rules.

Held, The mere mistake in the opening part of the Notification reciting the wrong source of power did not affect the validity of the amendments made by it. Merely a wrong reference to the power under which certain actions are taken by Government would not *per se* vitiate the actions done if they can be justified under some other power under which the Government could lawfully do these acts.

Though the right of second appeal on facts is taken away by the new rule 13 inserted in the Tax Rules by the Notification of December, 1949 such right is taken away by legislation by necessary intendment. In the circumstances the right of second appeal must be confined in all cases by necessary intendment to questions of law only.

The Madhya Bharat Taxes on Income (Validation) Act (XXXVIII of 1955) is not hit by Article 14 of the Constitution. By mistake the provision in the Finance Act 1950 that old assessments would be carried on by the corresponding officers under the Indian Income-tax Act was overlooked and the old assessments were made by the old officers under the old law. All that Parliament did by that Act was to allow the old assessments to be made under the procedure provided under the old law and as the old assessments stand on a different footing from new assessments after the new law comes into force there is no discrimination in the validating Act.

Appeal from the Judgment and Order dated 2nd January, 1959, of the Madhya Pradesh High Court (Indore Bench) at Indore in Civil Mis. Cas. No. 20 of 1955.

M. C. Setalvad and G. S. Pathak, Senior Advocates (B. Dutta, Advocate and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co. with them), for Appellant.

B. Sen, Senior Advocate (I. N. Shraff, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by Special Leave against the judgment of the Madhya Pradesh High Court. It raises the question of the validity of certain provi-

20th February, 1954

sions of the Indore Industrial Tax Rules, 1927, (hereinafter referred to as the Tax Rules) and assessments made thereunder for the years 1940 to 1948.

The appellant is a cotton mill, and in 1927 a tax was imposed on cotton mills in Indore in Holkar State by the then Ruler in respect of profits, gains and income of such mills. This was done under the Tax Rules promulgated by the Ruler of Indore. The procedure under the Tax Rules provided for a Board of assessing officers. The orders of the Board were open to appeal to the Member-in-charge of Commerce and Industry Department. Thereafter a second appeal was provided to the Government. Rule 17 of the Tax Rules further provided that the power of making Rules was vested in the Government, and such power shall, except on the first occasion of exercise thereof, be subject to the condition of previous publication. Rule 18 provided that rules made under rule 17 shall be published in the State Gazette, and thereafter shall have the force of law. Rule 19 provided that the Member-in-charge of Commerce and Industry Department shall have power to make subsidiary rules not inconsistent with the Tax Rules. On May 28, 1948, the Holkar State merged to form the State of Madhya Bharat. On July 19, 1948, the State of Madhya Bharat acceded to India. Ordinance No. 1 of 1948 was promulgated by the Rajpramukh of the new State of Madhya Bharat to provide for the peace and good Government of the State. This Ordinance was superseded by Act (1 of 1948) which came into force on December 13, 1948. Section 4 of the Act provided for the continuance of the existing laws, of any covenanting States or of any State which merged in the State of Madhya Bharat, until repealed or amended under the provisions of the Act. Section 5 of the Act provided that the Government may by notification published in the Government Gazette make regulations for the peace and good Government of all the territories which had already been included in the new State or which may be included in it under the provisions of section 3 of the Act. Such regulations were to have the force of law, unless they were repugnant to any Act or law or Ordinance made by the Rajpramukh, in which case, to the extent of their repugnancy they would be void. Further, it was provided that such regulations may repeal or amend any law already in force in any State before its administration was taken over or before it was, as the case may be, merged in the new State. Finally, the section provided that the right of the Rajpramuk to make Ordinances for the peace and good Government of the new State or of the States which may become merged in the said State would remain unaffected.

In view of the merger of the Holkar State with Madhya Bharat, some of the provisions of the Tax Rules had to be changed to bring them into line with the new set-up. Consequently, on December 28, 1949, the Government of Madhya Bharat issued a notification under rule 18 of the Tax Rules purporting to make rules under rule 17 thereof. These rules made certain amendments in the Tax Rules. It is not necessary to refer to all the amendments as we are concerned here only with three amendments. The first amendment was that instead of the Board making the assessment, the assessment was to be made by an assessing officer. The second amendment was that the appeal from the assessing officer was to be heard by an officer appointed from time to time by the Minister-in-charge of the Finance Department in place of the Member-in-charge of Commerce and Industry Department. The third amendment was with respect to second appeals. The amendment provided that instead of the Government hearing second appeals which under the old provision lay both on facts and law, second appeals thereafter were to be heard on a point of law by the High Court. Then came the Constitution of India on January 26, 1950, and the State of Madhya Bharat became one of the Part B States. In the Finance Act (XXV of 1950), which came into force on April 1, 1950 and applied to Madhya Bharat also, a provision was made that any law relating to income-tax or super-tax or tax on profits of business in any Part B State shall cease to have effect except for the purpose of levy, assessment and collection of income-tax and super-tax in respect of any period not included in the previous year for the purpose of assessment under the Indian Income-tax Act (XI of 1922) for the year ending on March 31, 1951 or for any subsequent year or, as the case may be, the levy, assessment

and collection of the tax on profits of business for any chargeable accounting period ending on or before March 31, 1949. The effect of this was that the Tax Rules came to be repealed from after the accounting year ending on March 31, 1949, and assessment could only be made under the Tax Rules up to the end of the accounting period ending on or before March 31, 1949. A further provision was also made in the Finance Act, 1950, that any reference in any such law to an officer, authority, tribunal or Court should be construed as a reference to the corresponding Officer, authority, tribunal or Court appointed or constituted under the Income-tax Act. The result of this provision was that even the assessments for the years previous to the accounting year ending on March 31, 1949, could only be made by the corresponding authorities under the Income-tax Act, and the appeals would lie to the corresponding authorities under the Income-tax Act; no levy and assessment could be made by the authorities under the repealed law and no appeal would lie to the authorities or Court under that law. It seems however that this provision of the Finance Act as to the authorities competent to make assessments was lost sight of with the result that assessments were made for the years in dispute in the present appeal which are all before the accounting year ending on March 31, 1949, by the authorities under the Tax Rules, as they were before their repeal. Consequently when this mistake was discovered, Parliament passed the Madhya Bharat Taxes on Income (Validation) Act (XXXVIII of 1954) (hereinafter referred to as the Validating Act), section 3 of which provided that

"notwithstanding anything contained in the first proviso to sub-section (1) of section 13 of the Finance Act, all proceedings taken, assessments made and other acts and things done (including orders made) by or before any officer, authority, tribunal or Court acting or purporting to act under the relevant Madhya Bharat law in connection with the levy, assessment and collection of any tax due, under any such law in respect of the relevant period shall be deemed always to have been valid and shall not be called in question on the ground only that such proceedings were not taken, assessments were not made or acts or things were not done by or before the corresponding officer, authority, tribunal or Court referred to in the said proviso."

Section 4 of the Validating Act further provided that

"if immediately before the commencement of this Act, any proceedings of the nature referred to in section 3 are pending before any officer, authority, tribunal or Court acting or purporting to act under the relevant Madhya Bharat law, such proceedings may, notwithstanding anything contained in the first proviso to sub-section (1) of section 13 of the Finance Act, be continued and completed in accordance with the provisions of the relevant Madhya Bharat law, and the provisions of the said proviso shall not apply, and shall be deemed never to have applied, in relation to any such proceedings."

What had happened in the present case and in some other cases relating to laws which corresponded to the Indian Income-tax Act was that the authorities under the Tax Rules made assessments in spite of the provisions in the Finance Act by which such assessments should thereafter have been made by the corresponding authorities under the Indian Income-tax Act, and that is why the Validating Act had to be passed.

The appellant challenged the validity of the assessments made against it under the Tax Rules by a writ petition filed in the Madhya Bharat High Court in 1955, on the following grounds :—

(1), The amendments of the Tax Rules on December 28, 1949, were invalid as such amendments could not be made under rule 17 of the Tax Rules, as was purported to be done.

(2) Even if the amendments made on December 28, 1949 were good, they could not have retrospective effect and could not take away the vested right of appeal.

(3) As after the Finance Act, 1950, assessments were made by the old officers appointed under the Tax Rules and not by the corresponding officers under the Indian Income-tax Act, the assessments were invalid and the Validating Act could not validate them (firstly) because the Validating Act itself was discriminatory and was hit by Article 14 and (secondly) because in any case it did not apply to the present assessments.

The High Court repelled all the contentions raised on behalf of the appellant and dismissed the writ petition. Thereupon the appellant applied to the High Court for a certificate of fitness, which was granted; and that is how the appeal has come up before us. We propose to deal with the points raised in the order in which they have been set out above.

The first question is about the validity of the amendments made in the Tax Rules on December 28, 1949. It is true that the notification by which amendments were made purports to have been published under rule 18 of the Tax Rules read with rule 17. The argument on behalf of the appellant is that rule 17 of the Tax Rules must be treated on a par with provisions in a statute which provide for framing of rules, and these rules are subordinate legislation made for carrying out the purposes of the statute, and the power to frame such rules does not include the power to modify the parent law under which the rules have to be framed. We do not think it necessary for present purposes to consider this argument, for we are of opinion that the amendments which were made in the Tax Rules on December 28, 1949 can be justified on the basis of Act 1 of 1948, which was passed on December 13, 1948, by the Rajpramukh. That Act, as already indicated, provided by section 5 that the Government, by notification published in the Government Gazette, may make regulations for the peace and good government of all the territories which had been included in the State of Madhya Bharat or which may be included in it under the provisions of section 3 of the Act. It also provided for the repeal or amendment by regulation of any law already in force in any State before its administration was taken over or before it was, as the case may be, merged in the United States. The Government had therefore the power to amend the Tax Rules under section 5 (1) read with section 5 (3) of Act 1 of 1948. The notification of December 28, 1949, by which the amendments were made was published in the Gazette of the Madhya Bharat State and the amendments were made by the Government. It is true that in the opening part of the notification it is said that the amendments were made under rule 17 of the Tax Rules; but that, in our opinion, would not conclude the matter, for if the Government had the power to make amendments under Act 1 of 1948, the amendments in the Rules could be justified under that power in spite of the wrong words used in the opening part of the notification of December 28, 1949. It is well settled that merely a wrong reference to the power under which certain actions are taken by Government would not *per se* vitiate the actions done, if they can be justified under some other power under which the Government could lawfully do these acts. It is quite clear that the Government had the power under section 5 (1) and (3) of Act 1 of 1948 to amend the Tax Rules, for that was a law in force in one of the merged States. The only mistake that the Government made was that in the opening part of the notification section 5 of the Act was not referred to and the notification did not specify, that the Government was making a Regulation under Act 1 of 1948. But that, in our opinion, would make no difference to the validity of the amendments, if the amendments could be validly made under section 5 of Act 1 of 1948. It is not disputed that the amendments could be validly made under section 5 of the Act 1 of 1948. We are therefore, of opinion that the mere mistake in the opening part of the notification in reciting the wrong source of power does not affect the validity of the amendments made. It is urged that the Government knew that it could only make Regulations under section 5 and it had made Regulations under section 5 of Act 1 of 1948 in certain cases. Even if that be so, there can, in our opinion, be no doubt about the validity of the amendments made, if the Government had power to make them, even though there was a mistake in the opening part of the notification publishing the amendments. All that section 5 of Act 1 of 1948 requires is the

publication of the Regulation made thereunder and its being made by Government ; and that has been complied with in this case. There is no other formality required for making a Regulation, and we are therefore of opinion that even though there was a mistake in the opening part of the notification of December 28, 1949, the amendments made in the Tax Rules can be upheld under section 5 of Act 1 of 1948 as a Regulation. We therefore reject the contention under this head.

Then it is urged that even if the amendments to the Tax Rules are good, they could not affect vested rights of appeal provided under the old law before the amendments and therefore in so far as the amendments affect this vested right, they are of no effect. Now it is well settled that even a vested right of appeal can be taken away by express legislation or by legislation which, though it may not expressly repeal the vested right of appeal, has the effect of such repeal by necessary implication. We have already pointed out that in view of the coming into existence of the new State of Madhya Bharat, amendments to the Tax Rules had become necessary in order to bring them into line with the structure of the new State. The three main amendments made in the Tax Rules have already been set out by us. Learned Counsel for the appellant does not attack two of them, namely, those relating to the assessment officer and the first appeal provided by the amendments. The attack is on the amendment of rule 13 of the Tax Rules providing for a second appeal. Under the old Rules, a second appeal lay to the Government both on fact and law ; under the new law, it lay to the High Court only on a question of law. The quarrel is not with the forum of the second appeal ; what is urged is that the new rule does not allow a second appeal on a question of fact while the old rule did. That is undoubtedly so. But considering the set up in which the amendments had to be made, it seems to us that even if the new rule cannot be read as an express provision taking away the right of second appeal on facts, it must in the circumstances be held that it does take away that right by necessary intendment. The new rule provided for a second appeal like the old rule, but confined it to a question of law. The necessary implication of the new rule therefore was that though a second appeal will continue to lie as before, its scope was cut down only to questions of law. We are therefore of opinion that though the right of second appeal on facts is taken away by the new rule 13 inserted in the Tax Rules, such right is taken away by legislation by necessary intendment. In the circumstances, we are of opinion that the right of second appeal after the amendment must be confined in all cases by necessary intendment to questions of law only. The contention under this head also fails.

Coming now to the last point with respect to the Validating Act, we have not been able to understand how the Validating Act can be said to be discriminatory in nature. A Validating Act is passed only when certain things have been done which require validation. This is exactly what the present Validating Act has done, and we fail to see on what grounds it can be said to be discriminatory. Even when the Finance Act of 1950 was passed it would have been open to Parliament to leave the old assessments to be carried on under the old procedure and by officers appointed under the old law, and such action could not be called discriminatory, for the simple reason that the old assessments stand on a different footing from new assessments after the new law comes into force. It is true that Parliament provided otherwise in this case and the Finance Act of 1950 said that the old assessments would be carried on by the corresponding officers under the Indian Income-tax Act. By mistake, however, that provision was overlooked and the old assessments were made by the old officers under the old law. All that Parliament did by the Validating Act was to allow the old assessments to be made under the procedure provided under the old law, and we can see no discrimination in the Validating Act on account of this fact. We are, therefore, of opinion that the validation is of no effect. 14. Further we have not been able to understand how the validation is of no effect so far as the present cases are concerned. The present cases are with reference to years 1940-48, that is before the accounting year ending on March 31, 1949. The assessments in these cases were carried on by the old officers under the old law, and

the Validating Act specifically validates such assessments. In these circumstances, we have not been able to understand how it can be said that these assessments have not been validated by the Validating Act. The contention under this head must therefore also fail.

The appeal fails and is hereby dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH, K. C. DAS GUPTA AND J. C. SHAH, JJ.

P. H. Kalyani

.. Appellant*

v.

M/s. Air France, Calcutta

.. Respondent.

Industrial Disputes Act (XIV of 1947), section 33 (2) (b)—Requisites for a proper application under—Bias of enquiring authority—Violation of the principles of natural justice—Scope of the powers of the Labour Court—Plea of victimisation—If open when the mistakes are admitted—Domestic enquiry defective—Order of dismissal—When operative.

The Proviso to section 33 (2) (b) of the Industrial Disputes Act (XIV of 1947) contemplates the three things mentioned therein namely (i) dismissal or discharge, (ii) payment of wages and (iii) making of an application for approval to be simultaneous and to be part of the same transaction so that the employer when he takes the action under section 33 (2) (b) by the dismissing or discharging an employee should immediately pay him or offer to pay him wages for one month and also make an application to the tribunal for approval at the same time. The employer's conduct also should show that the three things contemplated under the Proviso are parts of the same transaction.

It is now well settled that it is open to the tribunal to go into the propriety of an order of dismissal itself, when there is a defect in the domestic inquiry. The Labour Court, in the instant case would be entitled to go into the question whether the dismissal was justified on the evidence led before it, even if there was bias on the part of the Station Manager and therefore there was some violation of the principles of natural justice.

In the face of the appellant's admission of the mistakes, there could be no question of "victimisation" in the instant case.

If the domestic enquiry is not defective the Labour Court has only to see whether there was a *prima facie* case for dismissal and whether the employer had come to the *bona fide* conclusion that the employee was guilty of misconduct. Thereafter, if the Labour Court grants the approval, it would relate back to the date from which the employer had ordered the dismissal. If the enquiry is defective for any reason, the Labour Court would also have to consider for itself on the evidence adduced before it, whether the dismissal was justified. On coming to the conclusion on its own appraisal of the evidence adduced before it that the dismissal was justified its approval of the order of dismissal made by the employer in a defective enquiry would still relate back to the date when the order was made.

Appeal by Special Leave from the Award dated 22nd June, 1961, of the Second Labour Court, West Bengal, in Case No. 97/33-A of 1960.

N. N. Keswani, Advocate, for Appellant.

C. K. Daphtary, Solicitor-General of India (*H. L. Anand*, Advocate of *M/s. Anand Das Gupta, Sagar & Co.*, and *K. B. Mehta*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—This appeal by Special Leave challenges the order of the Second Labour Court, West Bengal, relating to the dismissal of the appellant, who was in the service of the respondent company. A charge-sheet was issued to the appellant on 23rd April, 1960, under the signature of the Station Manager of the respondent-company. The charge-sheet contained two charges of gross dereliction of duty inasmuch as the appellant had made mistakes in the preparation of a load-sheet on one day and a balance-chart on another day, which mistakes might have led to a serious accident to the aircraft. The appellant gave his reply to the charge-sheet on 26th April, 1960, in which he admitted the mistakes that had been made. He, however, contended that he was over-worked and further that it was the duty of others also to check the load-sheet and balance-chart prepared by him. 9th May, 1960, was fixed for inquiry by the Station Manager. The appellant objected to the inquiry being held by the Station Manager on the ground that the Station Manager was biased against him on account of the evidence which he had given against the Station Manager in a customs case which was partly responsible for the infliction of a fine on the Station Manager. His objection was however overruled and the inquiry was held by the Station Manager and completed on 10th May, 1960. Thereafter it appears that the Station Manager forwarded his findings and recommendations to the Regional Representative of the respondent-company. The appellant was dismissed on 28th May, 1960, by the Regional Representative; the order of dismissal provided for payment of one month's wages to the appellant and also stated that an application was being made before the First Industrial Tribunal, West Bengal, for approval of the action taken, apparently as some industrial dispute was pending before that tribunal. It appears that the order of dismissal was communicated to the appellant on 30th May, and one month's wages were also tendered to him. The same day the respondent filed an application before the First Industrial Tribunal, West Bengal, seeking approval of the action. On 3rd June, 1960, the appellant made an application under section 33-A of the Industrial Disputes Act, XIV of 1947 (hereinafter referred to as the Act), challenging the legality of the action taken on a large number of grounds.

These grounds were considered by the Labour Court and all of them were substantially decided against the appellant. The Labour Court held that the dismissal of the appellant was justified and therefore accorded approval for such dismissal. In particular, dealing with the various points raised on behalf of the appellant, the Labour Court held that the application under section 33 (2) (b) of the Act was validly made even though it had been made after the order of dismissal had been passed. It further held that the case was not covered by section 33 (1) of the Act and it was not necessary to obtain the previous permission of the tribunal before dismissing the appellant. It also held that the appellant was not a protected workman. Further as to the charge that the Station Manager was biased and therefore there was violation of the principles of natural justice, the Labour Court was of the view that the contention of the appellant that the Station Manager was biased against him because of the evidence he had given in the customs case could not be brushed aside lightly. But it went on to hold that even if there was some violation of the principles of natural justice inasmuch as the Station Manager was biased against the appellant, the respondent had adduced all the evidence before it in support of its action and it had

to decide on that evidence whether the action was justified and approval should be granted. In this connection, the Labour Court relied on the decision of this Court in *Phulbari Tea Estate v. Its workmen*.¹

The Labour Court then went into the evidence tendered before it. It pointed out that the appellant had admitted the two mistakes which were the basis of the charge. It also held that the mistakes were of a serious nature which might have resulted in an accident to the aircraft. It said that the fact that other people were also responsible for checking load-sheets and balance-charts would not mitigate the mistakes committed by the appellant who was primarily responsible for preparing them. It also repelled the charge of victimisation raised on behalf of the appellant on account of the delay in giving him the charge-sheet. Finally, it came to the conclusion that the mistakes committed by the appellant were serious involving possible accident to the aircraft and possible loss of human life. It was not prepared to accept the plea of over-work and other pleas raised on behalf of the appellant to mitigate the mistakes committed by him. It pointed out that the mistakes being of a serious nature the punishment of dismissal inflicted by the respondent could not be said to be unconscionable or entirely out of proportion to the gravity of the offence. It therefore dismissed the application of the appellant under section 33-A of the Act and accorded approval to the action taken by the respondent. This decision of the Labour Court is being challenged by the present appeal by Special Leave.

The main point which was raised in this appeal is now concluded by the decision of this Court in *The Straw Board Manufacturing Co., Ltd., Saharanpur v. Govind*.¹ This Court has held in that case that "the Proviso to section 33 (2) (b) contemplates the three things mentioned therein, namely, (i) dismissal or discharge, (ii) payment of wages, and (iii) making of an application for approval, to be simultaneous and to be part of the same transaction so that the employer when he takes the action under section 33 (2) by the dismissing or discharging an employee, should immediately pay him or offer to pay him wages for one month and also make an application to the tribunal for approval at the same time". It was further held that "the employer's conduct should show that the three things contemplated under the Proviso, are parts of the same transaction; and the question whether the application was made as part of the same transaction or at the same time when the action was taken would be a question of fact and will depend upon the circumstances of each case". In the present case the order of dismissal was passed by the Regional Representative on 28th May, 1960 and was communicated to the appellant on 30th May. The wages were offered to the appellant at the same time when the order was communicated to him, though he did not accept them. The respondent also made the application under section 33 (2) (b) to the Industrial Tribunal the same day. In these circumstances we are of opinion that the Labour Court was right in holding that the application under section 33 (2) (b) was in accordance with the Proviso to that section and was properly made.

Learned Counsel for the appellant has further raised some points which were raised, on behalf of the appellant before the Labour Court. In the first place, he contends that the appellant was a protected workman and the Labour Court was not right when it held that the appellant was not a protected workman. We are of opinion that the question whether a particular workman is a protected workman or not is a question of fact, and the finding of the Labour Court on such a question will generally be accepted by this Court as conclusive. Besides, the Labour Court has pointed out that the mere fact that a letter was written to the Manager of the respondent-company by the vice-president of the union in which the name of the appellant was mentioned as a joint secretary of the union

1. (1960) 1. S.C.R. 32.

1. A.I.R. (1962) S.C. 1500.

and the manager had been requested to recognise him along with others mentioned in the letter as protected workman would not be enough. The company had replied to that letter pointing out certain legal defects therein and there was no evidence to show what happened thereafter. The Labour Court has held that according to the rules framed by the Government of West Bengal as to the recognition of protected workmen, there must be some positive action on the part of the employer in regard to the recognition of an employee as a protected workman before he could claim to be a protected workman for the purpose of section 33. Nothing has been shown to us against this view. In the absence therefore of any evidence as to recognition, the Labour Court rightly held that the appellant was not a protected workman and therefore previous permission under section 33 (3) of the Act would not be necessary before his dismissal.

Then it is urged that after the Labour Court held that the Station Manager who held the inquiry was biased and there had been violation of the principles of natural justice, it was not open to the Labour Court to consider the question whether the appellant was rightly dismissed itself. On the other hand it has been urged on behalf of the respondent that the Station Manager could not in the circumstances of this case be said to have violated the principles of natural justice because the mistakes were admitted by the appellant and the inquiry was really formal and all that the Station Manager had to do was to recommend what he considered suitable punishment for the misconduct, which had taken place. It is also pointed out that the actual punishment was awarded by the Regional Representative and not by the Station Manager. There is some force in these contentions on behalf of the respondent in the circumstances of the present case. But we do not think it necessary to pronounce finally on the question whether in such circumstances there would be violation of natural justice. It is now well settled by a number of decisions of this Court that it is open to the tribunal to go into the propriety of an order of dismissal itself, when there is a defect in the domestic inquiry. In these circumstances even if it be held that the Station Manager was biased and therefore there was some violation of the principles of natural justice inasmuch as the inquiry was held by him, the Labour Court would be entitled to go into the question whether the dismissal was justified on the evidence led before it and this is exactly what the Labour Court did relying on the judgment of this Court in *Phulbari Tea Estate*¹. The contention therefore on behalf of the appellant that the Labour Court was not entitled to go into the question whether the dismissal was justified once it held that the domestic inquiry was defective, must be rejected.

Then it is urged that the Labour Court was wrong in holding that victimisation had not been proved. We however find no reason to differ from the finding of the Labour Court on the question of victimisation, apart from the fact that a finding of victimisation is generally a question of fact and cannot be agitated in this Court. The Labour Court has pointed out that the plea of victimisation on the ground that there was some delay in giving the charge-sheet to the appellant cannot be sustained, because the Station Manager came to know about the mistakes only a few days before the charge-sheet was given, though the mistakes had actually been committed in January and March, and also because the appellant admitted the mistakes and there could be no doubt therefore that he had committed them. We agree with the Labour Court that in the face of the appellant's admission of the mistakes there could be no question of victimisation in this case.

Finally it is urged that as the domestic inquiry was defective, there could be no approval of the action taken in consequence of such an inquiry and the Labour Court even if it held that the dismissal was justified should have ordered the dismissal from the date its award would become operative. In this connec-

1. (1960) 1 S.C.R. 32.

tion reliance was placed on the decision of this Court in *Messrs. Sasa Musa Sugar Works (P.), Ltd. v. Shobrat Khan*², where the following observations occur at p. 845 :—

“..... as the management held no inquiry after suspending the workmen and proceedings under section 33 were practically converted into the inquiry which normally the management should have held before applying to the Industrial Tribunal, the management is bound to pay the wages of the workmen till a case for dismissal was made out in the proceedings under section 33.”

We are of opinion that those observations cannot be taken advantage of by the appellant. That was a case where an application had been made under section 33 (1) of the Act for permission to dismiss the employees and such permission was asked for though no inquiry whatsoever had been held by the employer and no decision taken that the employees be dismissed. It was in those circumstances that a case for dismissal was made out only in the proceedings under section 33 (1) and therefore the employees were held entitled to their wages till the decision of the application under section 33. The matter would have been different if in that case an inquiry had been held and the employer had come to the conclusion that dismissal was the proper punishment and then had applied under section 33 (1) for permission to dismiss. In those circumstances the permission would have related back to the date when the employer came to the conclusion after an inquiry that dismissal was the proper punishment and had applied for removal of the ban by an application under section 33 (1) (see *The Management of Ranipur Colliery v. Bhuban Singh*³). The present is a case where the employer has held an inquiry though it was defective and has passed an order of dismissal and seeks approval of that order. If the inquiry is not defective, the Labour Court has only to see whether there was a *prima facie* case for dismissal, and whether the employer had come to the *bona fide* conclusion that the employee was guilty of misconduct. Thereafter on coming to the conclusion that the employer had *bona fide* come to the conclusion that the employee was guilty *i.e.*, there was no unfair labour practice and no victimisation, the Labour Court would grant the approval which would relate back to the date from which the employer had ordered the dismissal. If the inquiry is defective for any reason, the Labour Court would also have to consider for itself on the evidence adduced before it whether the dismissal was justified. However, on coming to the conclusion on its own appraisal of evidence adduced before it that the dismissal was justified its approval of the order of dismissal made by the employer in a defective inquiry would still relate back to the date when the order was made. The observations therefore in *Messrs. Sasa Musa Sugar Company's case*¹ on which the appellant relies apply only to a case where the employer had neither dismissed the employee nor had come to the conclusion that a case for dismissal had been made out. In that case the dismissal of the employee takes effect from the date of the award and so until then the relation of employer and employee continues in law and in fact. In the present case an inquiry has been held which is said to be defective in one respect and dismissal has been ordered. The respondent had however to justify the order of dismissal before the Labour Court in view of the defect in the inquiry. It has succeeded in doing so and therefore the approval of the Labour Court will relate back to the date on which the respondent passed the order of dismissal. The contention of the appellant therefore that dismissal in this case should take effect from the date from which the Labour Court's award came into operation must fail.

There is no force in this appeal and it is hereby dismissed. In the circumstances we pass no order as to costs.

K.L.B.

Appeal dismissed.

2. (1960) S.C.J. 10 : 1959 M.L.J. (Cr.) 981 : (1959) Supp. 2. S.C.R. 836. (845)

3. (1959) S.C.J. 1139 : (1959) 2 Ans. W.R. (S.C.) 232 : (1959) 2 M.L.J. (S.C.) 232 : (1959) M.L.J. (Cr.) 797 : (1959) Supp. 2 S.C.R. 719.

1. (1960) S.C.J. 10 = (1959) M.L.J. (Cr.) 981 = (1959) Supp. 2. S.C.R. 836.

THE SUPREME COURT OF INDIA. (Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, A. K. SARKAR, K. C. DAS GUPTA AND N. RAJAGOPALA
 AYYANGAR, JJ.

The State of Punjab and another

v.

The British India Corporation, Ltd.

.. Appellants*

.. Respondent etc.

Punjab Urban Immovable Property Tax Act, (XVII of 1940), section 4, clause (g)—Exemption under—Punjab Urban Immovable Property Tax Rules, 1941, Rule 18 (1) and (4)—Meaning of the words “used for the purpose of a factory” and “rent”.

It is neither necessary nor desirable to attempt to define what amounts to “use for the purpose of a factory”. That the Legislature left this undefined is a good indication that the intention of the Legislature was to have the question decided in any case where controversy arises over it on a consideration of the facts of the case. However two principles will be of easy application in the solution of the problem in the majority of cases. One is that where the building is used for a purpose which the factory law requires must be fulfilled in order that the factory may function: that will be user for the purpose of a factory. The other is that where the user of the building is such as is necessary for the efficiency of the machines or of the workmen engaged in the factory: the building should be held to be used for the purpose of the factory.

In its wider sense rent means any payment made for the use of land or building and thus includes the payment by a licensee in respect of the use and occupation of any land or building. In its narrower sense it means payment made by tenant to landlord for property demised to him. The word “rent” is used in its narrower sense in section 5 of the Act and the marginal note in section 14 which was some indication that there also the word “rent” was used in the narrower sense. In the absence of anything to indicate the contrary, it would be reasonable to think that the rule-making authority would not depart from the meaning in which it had reason to believe that the Legislature had used the word. The conclusion therefore is that the word “rent” in clause (ii) of Rule 18 (4) means payment to a landlord by a tenant for the demised property and does not include payments made by licensees.

Appeals from the Judgments and Orders dated 4th August, 1960 of the Punjab High Court in Letters Patent Appeal No. 186 of 1957; and 7th September, 1960 in Civil Writ No. 216 of 1958 respectively.

S. M. Sekhri, Advocate-General for the State of Punjab, and N. S. Bindra, Senior Advocate (P. D. Menon, Advocate, with them), for Appellant, (In both the Appeals.)

Bhagirath Das and B. P. Maheshwari, Advocates, for Respondent, (In C.A. No. 639 of 1961).

A. V. Viswanatha Sastri, Senior Advocate (O. P. Malhotra, Advocate and O. C. Mathur, J. B. Dadachanji and Ravinder Narain, Advocates, of M/s. J. B. Dadachanji & Co., with him) for Respondent, (In C.A. No. 287 of 1962).

The Judgment of the Court was delivered by:

Das Gupta, J.—These two appeals raise the question whether certain buildings belonging to the respondent the British India Corporation, Ltd., in one appeal and the respondent Shri Gopal Paper Mills, Ltd., in the other appeal, are liable to taxation under the Punjab Urban Immovable Property Tax Act, 1940. The buildings in both these cases are situated in the rating area shown in the Schedule to the Act and would consequently be liable to taxation under section 3 of the Act unless the exemption provided in section 4 of the Act is available. That section provides that the tax shall not be levied in respect of the properties mentioned in clauses, (a) to (g) thereof. Clause (g) mentions “such buildings and lands used for the purpose of a factory as may be prescribed”. “Prescribed” has been defined as “prescribed by the Rules made under the Act”. Rule 18 of the Punjab Urban Immovable Property Tax Rules, that were framed by the Punjab Government in 1941, prescribed buildings and lands for the purpose of clause (g) of section 4.

15th February, 1963.

The Assessing Authority rejected the claims for exemption made by the respondents and assessed the buildings for the purpose of taxation. The appeals to the Deputy Excise and Taxation Commissioner were unsuccessful. The respondents then moved the Punjab High Court under Article 226 of the Constitution praying that the order of the Taxation Commissioner be quashed. In both the cases the High Court held that the petitioners were entitled to the exemption prayed for and quashed the orders of assessment. The question in these appeals therefore is whether the High Court was right in its view that the buildings of the respondents come within the class which has been prescribed for exemption by Rule 18 of the Punjab Urban Immovable Property Tax Rules, 1941. The relevant portion of this Rule, which has been altered from time to time, stood thus in 1956 when the assessment order was made :—

"18. (1) Under the provisions of clause (g) of sub-section (1) of section 4 of the Act, all buildings and lands used for the purpose of a factory, which are owned by the proprietors of such factory, shall be exempt from the tax, if a manufacturing process involving the use of power is being and has been carried on therein for a continuous period of six months, or in the case of a seasonal factory since the commencement of the working season.

(4) The exemption provided by sub-rules (1) and (2) shall not extend to—

(i) godowns outside the factory compound ;

(ii) godowns, shops, quarters or other buildings, whether situated within or without the factory compound, for which rent is charged either from employees of the factory or from other persons ; and

(iii) bungalows or houses intended for or occupied by the managerial or superior staff whether situated within or without the factory compound."

There is a Proviso to sub-rule (1) with which we are not concerned. We are also not concerned with sub-rule (2) and (3) of rules 18.

The effect of this Rule therefore is that buildings belonging to the proprietors of the factory will get the benefit of exemption from taxation under section 4 of the Act provided three conditions are satisfied: (1) the building must be used for the purpose of a factory; (2) the factory must be one where a manufacturing process involving the use of power is being and has been carried on for a continuous period of six months; and (3) (a) no rent is being charged for the buildings; (b) it is not a godown outside the factory compound, or (c) it is not a bungalow or house intended for or occupied by the managerial or superior staff. In the present case there is no dispute that the second condition was satisfied, viz., that the factory was one in which manufacturing process involving the use of power was being and had been carried on for a continuous period of six months. Admittedly, also the building was not a godown outside the factory compound nor was it a bungalow or house intended for or occupied by the managerial or superior staff. The controversy is limited thus only to two questions: (1) Whether the building was used for the purpose of a factory and (2) whether rent was being charged for it.

Before we examine the facts of the two cases for solving the controversy we have to arrive at the correct interpretation of the words "used for the purpose of a factory" and the word "rent," in the Rule.

It is neither necessary nor desirable to attempt to define what amounts to "use for the purpose of a factory". That the Legislature left this undefined is a good indication that the intention of the Legislature was to have the question decided, in any case where controversy arises over it, on a consideration of the facts of the case. It appears to us to be reasonable to think, however, that two principles will be easy of application in the solution of the problem in the majority of cases. One is that where the building is used for a purpose which the factory law requires must be fulfilled in order that the factory may function, that will be used for the purpose of a factory. The other is that

where the user of the building is such as is necessary for the efficiency of the machines or of the workmen engaged in the factory the building should be held to be used for the purpose of a factory.

The 5th Chapter of the Factories Act contains numerous provisions for the welfare of workmen employed in the factory. Section 42 requires that adequate and suitable facilities for washing shall be provided and maintained for the use of the workers in every factory. It empowers the State Government to prescribe standards of the facilities to be provided. Section 43 empowers the State Government to make Rules in respect of any factory or class or description of factories requiring the provision "of suitable places for keeping clothing not worn during working hours and for the drying of wet clothing". Section 46 empowers the State Government to make Rules requiring that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers. Section 47 requires that in every factory employing more than one hundred and fifty workers "adequate and suitable shelters or rest rooms and a suitable lunch room, with provision for drinking water, where workers can eat meals brought by them shall be provided and maintained for the use of the workers". Section 48 requires the provision and maintenance of a "suitable room or rooms for the use of children under the age of six years of such women" employed in the factory if more than fifty women are employed ordinarily. Section 92 makes the contravention of any of the provisions of the Factories Act or of any Rule made thereunder or any order in writing given thereunder punishable with imprisonment or fine.

It is obvious therefore that in order that a factory may function in accordance with law buildings or parts of buildings have to be provided by the owner for the use of the workmen for the purposes mentioned in the several sections mentioned above. Such use of these buildings must therefore be held to be "use for the purpose of a factory".

Advances in scientific knowledge as to how industrial efficiency can be improved have made it clear that even other facilities and amenities, other than those required by the factory legislation, conduce in a great measure to a rise in the efficiency of the industrial worker and that some of these are indeed necessary to the maintenance of a proper standard of efficiency. Many enlightened employers of labour, taking a long view of things have therefore invested considerable sums of money for the provision of such facilities and amenities even though not required by law and have raised buildings for that purpose. In our opinion, the use of buildings for the provision of such facilities and amenities which are necessary to the maintenance of a proper standard of efficiency of the factory workers must also be held to be "use for the purpose of a factory". The learned Advocate-General, who appeared for the State of Punjab, readily agreed that when a building is provided for the use of the machinery in order that the machinery may function efficiently or that it may not deteriorate, the building is being used "for the purpose of a factory". He is reluctant however to apply a similar rule to a building used for the purposes of maintaining the efficiency of the men who work the machinery. We are unable to see any reasonable ground for this differentiation. Just as the use of a building for a purpose which maintains the efficiency of the machines is a user for the purpose of a factory, so also, we are convinced is the user of a building for the purpose of providing something which is necessary for maintaining the efficiency of the workers.

A large number of cases were cited at the Bar to show how the English Courts have understood the words "industrial purpose" or "purpose other than the manufacturing process or handicraft carried on in the factory" in connection with the Rating and Valuation (Apportionment) Act, and the Factory Act 1901.

No useful purpose will be served by discussing all these cases as the schemes of those Acts are largely different from our Act. We shall refer only, however, to the decision in *London Co-operative Society, Ltd. v. Southern Essex Assessment Committee*¹, to indicate the tendency of the English Courts in more recent times to attach importance to what is necessary for the welfare and efficiency of the workers in deciding the question.

There was a place of refreshments for persons employed in a laundry which was qualified as a factory and workshop and therefore was an "industrial hereditament". The question was whether this refreshment place was "solely used for some purpose other than the manufacturing process or handicraft, carried on in the laundry". The Kings Bench answered this question in the negative. Viscount Caldecote, C. J. said that applying the up-to-date considerations in the equipment and layout of a factory, the canteen was not a place which was "solely used for some purpose other than the manufacturing process or handicraft carried on in the laundry". His Lordship observed that these considerations might assist in the determination of the character of parts of a factory like—a lavatory, or a room where surgical first aid is provided or a cloakroom, or a number of other parts of the hereditament. Tucker, J. agreed with this conclusion and observed:—

"The element which, to my mind, is decisive is that the facts stated show that the canteen was necessary and essential for the welfare and efficiency of the workers engaged in the admittedly industrial part of the undertaking."

For applying the two principles mentioned above to the facts of these two appeals, we have to ascertain to what use the property in question has been put. In the first appeal (in which the British India Corporation, Ltd., is the respondent) we are concerned with four units: (1) A set of rooms used for indoor games by the mill employees; (2) one big hall used as the Gurkha Guards Club; (3) a set of rooms used as Officers' Club, and (4) a set of rooms used as residential quarters by workers of the mills.

In our opinion, the allotment of these buildings for the use of the workmen was made for a purpose which was necessary to the efficiency of the workmen.

The property assessed in the other appeal (in which Shri Gopal Paper Mills, Ltd., is the respondent) consists of 200 quarters which have been allotted to workers of the factory for their occupation. The provision of such quarters is clearly necessary to the welfare and efficiency of the workmen and it must be held that in this case also the buildings were being used for the purpose of a factory.

The next question is: what is the meaning of "rent" in clause (ii) of Rule 18 (4). In its wider sense rent means any payment made for the use of land or buildings and thus includes the payment by a licensee in respect of the use and occupation of any land or building. In its narrower sense it means payment made by tenant to landlord for property demised to him. Did the rule-making authority when providing that the exemption provided by sub-rules (1) and (2) of Rule 18 shall not extend to quarters and other buildings for which "rent" is charged, used the word in its wider sense or in its narrower sense? In seeking an answer to this question it is legitimate to examine the use of the word "rent" in the Act for which these Rules were made. At the time the Rules were first made in 1941 the Act used the word "rent" only in two sections. First, in section 5, where in providing how the annual value of land or building shall be ascertained the Legislature said that it shall be ascertained "by estimating the gross annual rent at which such land or building.....might reasonably be expected to let from year to year". It is absolutely clear that here the word "rent" is used in its strict and narrower sense of payment by

1. L.R. (1942) 1 K.B. 53.

tenant to landlord for demised property. The other section where the word "rent" occurs is section 14, where in providing for recovery of tax in arrears the Legislature said: ".....it shall be lawful for the prescribed authority to serve upon any persons paying rent.....to the person from whom the arrears are due, a notice stating the amount of such arrears of tax and requiring all future payments of rent by the person paying the rent to be made direct to the prescribed authority.....and also providing that such notice shall operate to transfer to the prescribed authority the right to recover, receive and give a discharge for such rent". While the section itself leaves it doubtful whether the word "rent" has been used in the narrower or the wider sense, the marginal note describes the subject matter of the section thus: "Recovery of tax from tenants". If this note is taken into consideration it becomes clear that in this section also the word "rent" was used in its narrower sense to mean payment made by tenant to landlord for demised property.

When in 1941 the rule-making authority set about framing the Rules, it had before it this clear use of the word "rent" in its narrower sense in section 5 and the marginal note in section 14 which was some indication that there also the word "rent" was used in the narrower sense. In the absence of anything to indicate the contrary, it would be reasonable to think that the rule-making authority would not depart from the meaning in which it had reason to believe that the Legislature had used the word, and that it used the word in clause (ii) of Rule 18 (4) in the same narrower sense of payment by tenant to landlord for demised property.

Our conclusion therefore is that the word "rent" in clause (ii) of Rule 18 (4) means payment to a landlord by a tenant for the demised property and does not include payments made by licensees.

In coming to this conclusion we have not overlooked the fact that there is scope for an argument that in clauses (d) and (e) of section 4 of the Act as they stand after the amendments in 1954 and 1957, respectively, the word "rent" has been used in the wider sense. Assuming that this is so, such use of the word in 1954 and 1957 cannot be taken into account for the purpose of interpretation, as the Rule under consideration was framed long before these dates.

Coming now to the facts of the two cases before us, we find that admittedly, in both the cases the property that has been assessed was allowed to be used by the employees on leave and licence. Whatever payment was received from them was not therefore "rent" within the meaning of clause (ii).

Our conclusion therefore is that no tax is leviable under the Punjab Urban Immovable Property Tax Act, 1940, in respect of the buildings in these two appeals. The High Court therefore rightly quashed the orders of assessment. The appeals are accordingly dismissed with costs.

Appeal dismissed.

K.L.B.

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction).

PRESENT :—S. K. DAS, A. K. SARKAR, AND M. HIDAYATULLAH, JJ.
Chandra Bhan Gossain .. Appellant*

.. Respondents.

v.
The State of Orissa and others

Orissa Sales Tax Act, (XIV of 1947)—Manufacture and supply of bricks under contract which says "land will be given free"—If amounts to sale of goods on which tax could be levied.

A sale which can be taxed under the Orissa Sales Tax Act, 1947, has been defined as "Any transfer of property in goods for cash or deferred payment or other valuable consideration." It

5th April, 1963.

seems that when the clause in the contract said "land will be given" it meant that the property in the earth to be dug out for making the bricks would be transferred to the appellant. Again what was supplied to the Company by the appellant was not the earth which he got from it but bricks which are something entirely different. Other provisions in the contract plainly show that the contract was for sale of bricks. It is not necessary that to constitute a sale, the word sale has to be used.

To decide whether the contract was for sale of goods or one of work done and materials found, the test is what was the essence of the Contract? Applying this test in the instant case it must be held to be a sale.

Appeals by Special Leave from the Judgment and order dated 23rd July, 1959, of the Orissa High Court in O.J.C. No. 33 of 1959.

A. Ranganadham Chetty, Senior Advocate, (*B. D. Dhawan*, *S. K. Mehta* and *K. L. Mehta*, Advocates, with him), for Appellant.

C. K. Daphtary, Attorney-General for India, (*R. Ganapathy Iyer* and *R. N. Sachthey*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Sarkar, J.—The appellant had entered into a contract with a company called the Hindusthan Steel Private Ltd. for the manufacture and supply of bricks at Rourkela in Orissa. Large quantities of bricks were manufactured and supplied under the contract and the appellant received payment for them. The respondent State assessed the appellant to sales tax under the Orissa Sales Tax Act, 1947, on these supplies on the basis that they were sales. The appellant contended that the contract was only for labour or for work done and material found, and that there was really no sale of any goods on which the tax could be levied. He moved the High Court of Orissa for a writ of *mandamus* directing the respondent State not to assess or levy the tax. The application was rejected *in limine* by the High Court. The appellant has now come to this Court in further appeal.

Now a sale which can be taxed under the Act has been defined as "Any transfer of property in goods for cash or deferred payment or other valuable consideration." The point at issue is whether the contract was for a transfer of property in the bricks from the appellant to the Company for a consideration.

It is said that the bricks were made out of earth belonging to the Company and, therefore, the bricks had all along been its property and there could be no transfer of property in them to it. This contention is founded on a clause in the contract which says, "land will be given free" and which was apparently intended to make the earth available to the appellant for making the bricks.

We are unable to agree that this clause proved that the earth all along continued to belong to the Company. It seems to us that when the clause said, "land will be given", it meant that the property in the earth to be dug out for making the bricks would be transferred to the appellant. It may be presumed that it was understood that in quoting his rate for the bricks, the appellant would take into account the free supply of earth for making the bricks. Again what was supplied to the Company by the appellant was not the earth which he got from it but bricks, which, we think, are something entirely different. It could not have been intended that the property in the earth would continue in the Company in spite of its conversion into such a different thing as bricks. Further we find that the contract provided that the bricks would remain at the appellant's risk till delivery to the Company. Now, obviously bricks could not remain at the appellant's risk unless they were his property. Another clause provided that the appellants would not be able to sell the bricks to other parties without the permission of the Company. Apparently, it was contemplated that without such a provision the appellant could have sold the bricks to others. Now he could not sell the bricks at all unless they belonged to him. Then we find that in the tender which the appellant submitted and the acceptance of which made the contract, he stated,

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"I/we hereby tender for the supply to the Hindusthan Steel Private Ltd. of the materials described in the undermentioned memorandum".

The memorandum described the materials as bricks, and also stated the "Quantities to be delivered" and the "Rate at which materials are to be supplied". All these provisions plainly show that the contract was for sale of bricks. If it were so, the property in the bricks must have been in the appellant and passed from him to the Company. The same conclusion follows from another provision in the contract which states that if bricks are stacked in a specified manner.

"Then 75% of the value of the bricks at kiln site will be measured and paid. The balance of 25%..... will be paid finally when all the bricks have been delivered.....Only full bricks as finally deliveredwill be taken into account"

Before we leave this part of the case we have to notice the decision in *P. A. Raju Chettiar v. The State of Madras*¹ to which learned Counsel for the appellant referred. We do not think however that it is of any assistance. That was a case in which a merchant had delivered silver to workmen for manufacture of utensils and the workmen returned the manufactured utensils. It was held that there was no sale of the silver by the merchant to the workmen. It was so held because the weight of the silver had been debited to the workmen on delivery and credited to them on the manufactured goods being made over to the merchant and the price of the silver had never been debited or credited to them. Furthermore, the workmen had been paid only the charges for their labour. On these facts it could not be said that the property in the silver had ever passed to the workmen. The facts in the present case are different and for the reasons earlier mentioned, justify the view that here there was a transfer of the property in the earth to the appellant by the Company.

Learned Counsel stressed the fact that the contract nowhere used the word 'sale' in connection with the supply of the bricks, in support of his argument that there was no sale. But it is not necessary that to constitute a sale, the word 'sale' has to be used. We have said enough to show that under the contract there was a transfer of property in the bricks for consideration and therefore, a sale notwithstanding that the word 'sale' was not used.

The other argument of learned Counsel for the appellant was that even if the earth of which the bricks had to be made be taken to have been transferred under the contract to the appellant, this was not a contract for sale of goods but one of work done and materials found. A contract of this kind is illustrated by the case of *Clay v. Yates*¹. There the contract was to print a book, the printer to find the materials including the paper. *Robinson v. Graves*² was also referred to. There a person had commissioned an artist to paint the portrait of a lady and it was held that the contract was not for sale of goods though the artist had to supply the paint and canvas and had to deliver the completed picture. In these cases applied is, what was the essence of the contract? Was it the intention of parties in making the contract that a chattel should be produced and transferred as a chattel for a consideration? This test has now been accepted as of general application to decide whether a contract was for sale of goods or for labour supplied and materials found: see Benjamin on Sales (8th ed.) p. 161 and Halsbury's Laws of England (3rd ed.) vol. 34, p. 6.

It is true that the test will often be found to be difficult of application. But no such difficulty arises in this present case. Here the intention of the parties in making the contract clearly was that the Company would obtain delivery of the bricks to be made by the appellant; it was a contract for the transfer of chattels *qua* chattels. The essence of the contract was the delivery of the bricks, though no doubt they had to be manufactured to a certain specification. It would be

1. I. H. & N. 73.

absurd to suggest that the essence of the contract was the work of manufacture and the delivery of the bricks was merely ancillary to the work of manufacture, in the same way as the delivery of the paint and the canvas were held to be ancillary to the contract to paint the portrait in *Robinson v. Graves*².

The fact that under the contract the bricks had to be manufactured according to certain specifications, and, therefore, the appellant had to bestow a certain amount of skill and labour in the manufacture of the bricks, does not affect the question. That was not the essence of the contract. The object of the contract nonetheless remained the delivery of bricks. It has never been doubted that "claim of a tailor or a shoemaker is for the price of goods when delivered, and not for the work or labour bestowed by him in the fabrication of them": see *Grafton v. Armitage*³ and *J. Marcel (Furriers) Ltd. v. Tapper*⁴. The present case, therefore, must *a fortiori* be one of sale of goods.

It remains now to notice a preliminary objection to this appeal raised by the respondent. It was said that before the High Court was moved under Article 226 for the writ, the appellant had filed appeals against the orders of assessment to the Sales Tax Appellate Tribunal. These appeals failed and the appellant's application for an order on the Tribunal to refer to the High Court the question of law raised in this appeal was also rejected by the High Court. It is therefore, said that this appeal is concluded by the order of the High Court last mentioned. But it appears that this Court had granted leave to appeal from the High Court's order refusing to issue the writ before the appeal to the Tribunal had been dismissed. The appellant could have appealed from the High Court's order refusing to direct a Reference of the question but he chose to prosecute the appeal against the order in the petition for the writ which would have given him the same relief. Either remedy was open to him and neither can be said in the circumstances to be barred by the other.

The appeal however fails on the merits and it is dismissed with costs.

K.L.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA (Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH, K. C. DAS GUPTA, AND J. C. SHAH, JJ.

Ranendra Chandra Banerjee

.. *Appellant**

v.

The Union of India and another

.. *Respondents*

Constitution of India (1950), Article 311 (2)—Applicability to the termination of the services of a probationer—Effect of the terms of the letter of appointment—Civil Services (Classification, Control and Appeal) Rules, Rules 49, 55-B and Rule 3 (a)—Scope and applicability—What amounts to sufficient compliance with Rule 55-B.

It is well settled that where services of a temporary Government servant are terminated not by way of punishment Article 311 of the Constitution of India, 1950, will not apply and the services of such a servant can be terminated under the terms of the contract or by giving him the usual one month's notice.

Parshotam Lal Dhingra v. Union of India (1958) S.C.J. 217, referred to.

A Government servant who is on probation can be discharged and such discharge would not amount to dismissal or removal within the meaning of Article 311 (2), where the services are not terminated by way of punishment. A probationer has no right to the post held by him and under the terms of his appointment he is liable to be discharged at any time during the period of probation subject to the rules governing such cases.

2. L. R. (1935) I. K. B. 579. 3. (1845) Z. C. B. 336. 4. (1955) I. All & E. R. 15.
* C. A. No. 271 of 1962. 18th February, 1963.

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State of Orissa v. Ram Naran Das, (1961) 1 S. C. J. 209, referred to.

Explanation (2) of Rule 49 of the Civil Services (Classification Control and Appeal) Rules was further amended in November, 1949, and by that amendment. *Explanation* (2) was deleted and a new *Explanation* was substituted which was in force at the relevant time. The appellant therefore cannot claim the protection of Article 311 (2).

Rule 3 (a) excludes the application of the Rules only in cases of persons for whose appointment and conditions of employment special provision is made by or under any law for the time being in force. The relevant term in the letter of appointment issued to the appellant is nothing more than the usual term one finds in letters of appointment issued to persons appointed on probation and the High Court was not right in holding that Rule 55-B will not apply to the appellant.

In a case covered by Rule 55-B all that is required is that the defects noticed in the work which made a probationer unsuitable for retention in the service should be pointed out to him and he should be given an opportunity to show cause against the notice. In the instant case, there has been sufficient compliance with Rule 55-B.

Appeal from the Judgment and Order dated the 18th May, 1959, of the Punjab High Court (Circuit Bench), at Delhi in L.P.A. No. 24-D of 1956.

K. B. Mehta, Advocate, for Appellant.

N. S. Bindra, Senior Advocate, (R. H. Dhebar, Advocate for R. N. Sachthey, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

WANCHOO, J.—This is an appeal on a certificate granted by the Punjab High Court. The appellant was selected for the post of Programme Assistant on 3rd May, 1949, and was appointed on probation for one year, and the letter of appointment said that during the said period his services might be terminated without any notice and without any cause being assigned. He was asked to accept the offer on this condition. The appellant accepted the offer and joined service on 4th June, 1949. His period of probation expired on 3rd June, 1950, but it was extended from time to time. On 4th July, 1952, the appellant was informed that his probation period could not be extended and was called upon to show cause why his services should not be terminated. The appellant showed cause. He was finally informed that the explanation given by him was not satisfactory and that his services were to be terminated after 31st August, 1952.

The appellant then filed a petition under Article 226 of the Constitution in the Punjab High Court and his main contention was that he was entitled to the protection of Article 311 (2) of the Constitution and as this was not afforded to him the order terminating his services was illegal. Besides it was urged on his behalf that he was governed by Rules 49 and 55-B of the Civil Services (Classification, Control and Appeal) Rules (hereinafter referred to as the Rules) and therefore he was entitled to the protection of those rules. As however his services had been terminated without compliance with those rules he was in any case entitled to reinstatement.

The High Court held that the appellant was not entitled to the protection of Article 311 (2) of the Constitution. It further held that Rules 49 and 55-B of the Rules which provided that his services might be terminated without any notice and without any cause being assigned during the period of probation. The High Court further held that Rules 49 and 55-B would not in any case apply to the appellant in the face of the contract under which he was appointed in view of Rules 3 (a) of the Rules. The petition was consequently dismissed, but the High Court granted a certificate to the appellant that the case was a fit one for appeal to this Court; and that is how the matter has come up before us.

It is not in dispute that the appellant was never confirmed in his appointment. It is also not in dispute that though the letter of appointment said that the appellant will be on probation for a period of one year, his probation period was

extended from time to time. We agree with the High Court that though the letter of appointment did not say in so many words that the probation was likely to be extended, it was implicit therein that the probation would continue till such time as the appellant was confirmed or discharged and so would the term in the appointment letter that his services were liable to be terminated without any notice and without any cause being assigned, during the period of probation.

The first question that falls for determination is whether the appellant is entitled to the protection of Article 311 (2) : for if he is entitled to that protection it is not disputed that provision was not complied with in this case before his services were terminated. It is now well settled that the protection of Article 311 of the Constitution applies to temporary Government servants also where dismissal, removal or reduction in rank is sought to be inflicted by way of punishment. But it is equally well settled that where the services of a temporary Government servant are terminated not by way of punishment, Article 311 will not apply and the services of such a servant can be terminated under the terms of the contract or by giving him the usual one month's notice; (see *Parshotam Lal Dingra v. Union of India*¹). Further it is equally well settled that a Government servant who is on probation can be discharged and such discharge would not amount to dismissal or removal within the meaning of Article 311 (2) and would not attract the protection of that Article where the services of a probationer are terminated in accordance with the rules and not by way of punishment. A probationer has no right to the post held by him and under the terms of his appointment he is liable to be discharged at any time during the period of his probation subject to the rules governing such cases: (see *The State of Orissa v. Ram Naran Das*²). The appellant in the present case was undoubtedly a probationer. There is also no doubt that the termination of his service was not by way of punishment and cannot therefore amount to dismissal or removal within the meaning of Article 311. As a probationer he would be liable to be discharged during the period of probation subject to the rules in force in that connection. The High Court therefore was right in holding that the appellant was not entitled to the protection of Article 311 (2) of the Constitution.

It is however urged on behalf of the appellant that the rules themselves made it obligatory that Article 311 (2) should be complied with before the services of a probationer were terminated. In this connection reliance is placed on *Explanation 2* to Rule 49 of the Rules, as amended on October 10, 1947. That *Explanation* reads as follows :

"The discharge of a probationer whether during or at the end of the period of probation, for some specific fault or an account of his unsuitability for the service, amounts to removal or dismissal within the meaning of this rule."

Now if this *Explanation* were in force in 1952 when action was taken against the appellant, his contention that Article 311 (2) applied to him would be correct. But we find that Rule 49 was further amended in November, 1949, and by that amendment *Explanation 2* was deleted, and a new *Explanation*, which took the place of *Explanations 1 and 2* of the rule as it stood after the amendment of October 10, 1947 was substituted. This new *Explanation* which was in force at the relevant time, is in these terms :

"The termination of employment—

(a) of a person appointed on probation during or at the end of the period of probation, in accordance with the terms of the appointment and the rules governing the probationary service; or

(b)

(c)

does not amount to removal or dismissal within the meaning of this rule or Rule 55."

Therefore when action was taken against the appellant in 1952, it was this *Explanation* which governed the appellant and accordingly if his services were terminated in accordance with the terms of his appointment and the rule governing his

1. (1958) S.C.J. 217—(1958) S.C.R. 828.

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probationary service and not as a measure of punishment, the appellant cannot claim the protection of Article 311 (2). His contention based on *Explanation 2* to Rule 49 as it existed after the amendment of October, 1947, must therefore fail as that *Explanation* had been deleted along before action was taken against the appellant. The main contention of the appellant therefore that he was entitled to the protection of Article 311 must fail.

In the alternative, it has been urged on behalf of the appellant that he was entitled to the protection of Rule 55-B and as that rule was not complied with, the termination of his service was illegal. The High Court held that Rule 55-B would not apply to the appellant because in the letter of appointment issued to him it was said that his services were liable to be terminated without any notice and without any cause being assigned. The reason why the High Court held that that term in the letter of appointment would prevail over Rule 55-B is that where there is conflict between the terms of contract and the Rules, the former must prevail, under Rule 3 (a).

Two questions thus arise in this connection: the first is whether in view of Rule 3 (a) the appellant will not be entitled to the protection of Rule 55-B, and the second is whether he was afforded the protection of Rule 55-B before action was taken to terminate his service if that rule applies. Rule 55-B was inserted in the rules in November, 1949 and reads thus:

"Where it is proposed to terminate the employment of a probationer whether during or at the end of the period of probation, for any specific fault or on account of his unsuitability for the service, the probationer shall be apprised of the grounds of such proposal and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the employment".

This rule would clearly apply to the appellant who was a probationer as it was in force at the relevant time, unless Rule 3 (a) makes it inapplicable in view of the term mentioned above in the letter of appointment issued to him. Rule 3 (a) lays down:—

These rules shall apply to every person in the whole-time civil employment of a Government in India (other than a person so employed only occasionally or subject to discharge at less than one month's notice) except:—

(a) persons for whose appointment and conditions of employment special provision is made by or under any law for the time being in force.

(b) -----

Rule 3 (a) thus excludes the application of the Rules only in case of persons for whose appointment and conditions of employment special provision is made by or under any law for the time being in force. It has not been shown to us that any special provision has been made as to the appointment and conditions of employment of persons in the All-India Radio service by or under any law for the time being in force. It cannot be said therefore that the term already mentioned, which appears in the letter of appointment issued to the appellant, is a special provision by virtue of any law or was inserted under any law for the time being in force. That term is nothing more than the usual term one finds in letters of appointment issued to persons appointed on probation. The High Court was therefore in our opinion not right in holding that Rule 55-B will not apply to the appellant because of this term in the letter of appointment issued to him. We hold that Rule 55-B will apply to the appellant and is not excluded by Rule 3 (a).

The next question is whether Rule 55-B was complied with. The facts in that connection are these. On 6th December, 1951, soon after the appellant's probation was extended upto 3rd June, 1952, he was informed that during the period he had been employed his work had been found to be much below the standard required for the post. The main defects that were found were also pointed out to him, namely, "(i) immature taste, (ii) cannot be entrusted to work without supervision, and (iii) has few ideas but cannot think logically and plan systematically". He was therefore

given an opportunity to remedy the defects and to make attempts to bring himself up to the standard at least of an average Programme Assistant. He was further informed that he should do so by systematic concentration on his subjects, application to his job and by making wider studies and contacts. He was told to seek guidance and help of his senior officers wherever required in effecting the necessary improvement. Finally he was told that it would not be possible to give him any further extension of probation after the present one and that if his work during that period did not come up to the required standard, his services might have to be terminated. The appellant thus had been warned to improve his work as far back as December, 1951. On 4th July, 1952, the appellant was given a notice by which he was afforded an opportunity to show cause why his services should not be terminated and was informed that any representation made by him in this regard would be duly considered. The notice said that the appellant's work had not come up to the average standard of a Programme Assistant and four defects were pointed out, namely, (i) immaturity in taste, and want of tact and discretion, (ii) inability to think logically and plan systematically, (iii) want of programme sense and background necessary for an average programme man and (iv) he could not be entrusted to work without supervision. The appellant gave his explanation in reply to this notice which was duly considered and on July 31, 1952, he was informed that his explanation had not been considered satisfactory and therefore his service would be terminated after 31st August, 1952.

It has been contended on behalf of the appellant that this was not sufficient compliance with Rule 55-B. That rule lays down that the probationer shall be apprised of the grounds on which it was proposed to terminate his services and given an opportunity to show cause against it. We are of opinion that the appellant's contention must be rejected. The appellant was apprised of the grounds on which it was proposed to discharge him. But what is urged is that the elaborate procedure provided in Rule 55 should have been gone through under Rule 55-B also. Rule 55 however deals with cases of removal, dismissal or reduction in rank, which are specifically covered by Article 311 (2) of the Constitution and the procedure prescribed therein is meant for these three major punishments. That procedure is not meant to be applicable under Rule 55-B which deals with the discharge of a probationer which is not a punishment at all. Therefore in a case covered by Rule 55-B all that is required is that the defects noticed in the work which make probationer unsuitable for retention in the service should be pointed out to him and he should be given an opportunity to show cause against the notice, enabling him to give an explanation as to the faults pointed out to him and show any reason why the proposal to terminate his services because of his unsuitability should not be given effect to. If such an opportunity is given to a probationer and his explanation in reply thereto is given due consideration, there is in our opinion sufficient compliance with Rule 55-B. Generally speaking the purpose of a notice under Rule 55-B is to ascertain, after considering the explanation which a probationer may give, whether he should be retained or not and in such a case it would be sufficient compliance with that rule if the grounds on which the probationer is considered unsuitable for retention are communicated to him and any explanation given by him with respect to those grounds is duly considered before an order is passed. This is what was done in the present case and it cannot therefore be said that the appellant was not given the opportunity envisaged by Rule 55-B. We therefore dismiss the appeal, though for slightly different reasons. In the circumstances there will be no order as to costs.

K. L. B.

Appeal dismissed.

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JAWAHARLAL NEHRU

We mourn the death of Jawaharlal Nehru, and share in the universal grief.

Nehru's life was a many-splendoured thing. Tributes are being paid to his qualities and achievements as a nation-builder, world statesman, humanist and writer. To us he was the epitome of national consciousness and unity. To the world outside he was the symbol of international amity and understanding. But there is one aspect of his life and personality, of special significance to the legal profession, to which adequate attention has not, perhaps, been paid. We do not refer to his all-too brief career at the Bar, for Nehru himself did not seem to set much store by it.

"There was little that was inviting in that legal past of mine, and at no time have I felt the urge to revert to it. But still my mind played with the ifs and possibilities of that past—a foolish but an entertaining pastime when inaction is thrust on one—and I wondered how life would have treated me if I had stuck to my original profession. That was not an unlikely contingency, though it seems odd enough now; a slight twist in the thread of life might have changed my whole future. I suppose I would have done tolerably well at the Bar, and I would have had a much more peaceful, a duller, and physically a more comfortable existence than I have so far had. Perhaps I might even have developed into a highly respectable and solemn-looking judge with wig and gown, as quite a number of my old friends and colleagues have done." *"The Mind of a Judge" Written in Prison* (September, 1935).

Even though destiny did not allow him to practise the profession of the law, there can be no doubt that Nehru always held fast to a basic philosophy of law. He believed in the rights of man and the dignity of the individual. He believed in a democratic society and constitutional methods. He believed in world peace and peaceful co-existence between peoples of different ideologies.

Nehru's concept of law was liberal, humanist and vibrant. According to him, "Laws are meant to fit existing conditions, and they are meant to help us to better ourselves. If conditions change, how can the old laws fit in? They must change with changing conditions, or else they become iron chains keeping us back while the world marches on. No law can be an 'unchangeable law'. It must be based on knowledge, and as knowledge grows, it must grow with it." (*Glimpses of World History*).

Nehru had an abiding faith in the Rule of Law. Speaking at the inauguration of the International Congress of Jurists held at New Delhi in January, 1959, he said: "It is clear that unless a community lives under a Rule of Law it will tend to be lawless, to have no rule, and that means more or less an anarchical way of subsisting. So Rule of Law has to be there to bind a community. And to preserve and maintain the Rule of Law, seems to be synonymous with the maintenance of civilised existence.

Also if there is to be a Rule of Law, there should be independent people—judges—to administer the law ; otherwise the law may be used and exploited in the interest, not of the law, but of other interests.”

At the same time, Nehru felt the need for equating law with life itself. “The Rule of Law which is so important must run closely to the Rule of Life. It cannot go off at a tangent from life’s problems and be an answer to problems which existed yesterday and are not so important to-day. It is to deal with to-day’s problems. And yet, law, by the very fact that it speaks something basic and fundamental, has a tendency to be static. That is the difficulty. It has to maintain a basic and fundamental character, but it must not be static as nothing can be static in a changing world.”

Nehru believed in a Constitution, but he preferred one which would keep in touch with the life of the people. Speaking in the Constituent Assembly in November, 1948, he said :

“A Constitution, if it is out of touch with the people’s life, aims and aspirations, becomes rather empty ; if it falls below those aims, it drags the people down. It should be something higher to keep people’s eyes and minds up to a certain high mark.”

Nehru, however, put greater faith on the people and the strength of their character than on written laws and Constitutions. Speaking on the occasion of Independence Day, 1949, he said :

“Laws and Constitutions do not by themselves make a country great. It is the enthusiasm, energy and constant effort of a people that make it a great nation.”

Nehru’s legal philosophy, along with his economic and political philosophies, is likely to have a lasting influence in our country. It is a solace that the principles that Nehru held dear are not only unexceptionable in themselves, but are conducive to the sustenance and progress of our nation as a sovereign democratic republic.

COUNSEL AT THE POLICE SCREENING PROCESS. SCOPE OF THE RIGHT IN THE UNITED STATES AND INDIA.

By

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The characteristic feature of the initial phase of the criminal process—i.e., the period that intervenes between the invocation of the process against a person and his production before a judicial officer—is the marked absence of a disinterested and unprejudiced third party to ensure fairness in procedure and justice and impartiality in the decision-making. The vesting of the function of decision-making in the impartial Judge, who presides over and supervises any proceeding, is one of the principal safeguards that a judicial proceeding under the adversary system offers to the accused against arbitrary and oppressive action. In his capacity as an intermediary, the Presiding Judge keeps the necessary balance between the adversaries, who have opposing motives and apparently conflicting interests—the State, in the interest of society, endeavouring to establish the guilt of the person charged with the offence and to impose on him the penal sanctions following his conviction, and the accused on the other side, striving hard to refute the charges against him and to prove his innocence in order to protect his life, liberty and dignity. But during the pre-judicial process, the usual “triangular situation” is notably non-existent. The State which appears as the accuser and the antagonist at the trial and appellate stages assumes to itself the function of decision making as well. As has been pointed out by Prof. Schwartz¹, in another context “it is when the agency is not a third party Judge, but both party and Judge, the position of the private citizen is at its weakest.”

At the same time, the decisions taken during the period to invoke, apply or alleviate the process have the same effects and consequences to the person concerned as the later ones that are taken at the committal, trial and post-conviction stages. Despite the presumption of innocence that supposedly halos every suspect, these decisions may also deprive a person of his life, liberty, dignity² or property through the imposition of deadly force, search and seizure, accusation, imprisonment or by the requirement of bail. The authority to make these decisions is invested on the primary agencies of law enforcement—the investigating and prosecuting officials—on whom there is a direct pressure to “solve” crimes and “to bring criminals to justice” and hence whose impartiality is subjected to the greatest stress.

The assumption of the role of the decision-maker by the accusing party coupled with the absence of supervision and lack of regularity in procedure, are factors, which demand the closest surveillance of the methods and policies of those who administer justice in this area, which is often described to be the “weakest link” in our system of criminal law administration. And no chain is any more strong than its weakest link!

What could counsel do in this situation? Could he effectively participate in the process, which is essentially non-judicial in nature? What is the basis for the ‘fear’ that counsel’s participation in it is arer, which is considered to be the exclusive ‘domain’ of the primary agencies of law enforcement, would hamper the “proper” administration of criminal justice?

1. Schwartz, “*English Administrative Law*”, 2 How L.J. 230 (1956).

2. The criminal process, from arrest through release is comprised of a series of “status” degradation ceremonies”. As a result of the redefinition of individual status which accompanies being labelled “accused”, “convict”, or “ex-convict” many releasees pay the penalty for their offences and suspected offences on a never-ending instalment plan. For an interesting discussion on Stigma, Status degradation, and Status elevation ceremonies in the criminal process, see Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 Am.J. Sociology, 420 (1956).

INVOCATION OF THE PROCESS.

In the majority of instances the criminal process is invoked in the United States and India by the Police Officer when he takes into custody a person without warrant. The State and Federal statutes in the United States and the Indian Code of Criminal Procedure authorise him to do so upon "reasonable cause", under a variety of circumstances;³ but a satisfactory definition of what constitutes reasonable cause has not been formulated in a meaningful way.⁴ As a result there is in fact a delegation of immense power and responsibility to the law enforcement officers⁵ in this area. When an arrest is made pursuant to a warrant, the officer executing the same shares the responsibility for the decision with the magistrate and the prosecuting attorney.⁶ But when a police officer makes an on-the-spot-decision to take a person into custody the responsibility is his own.⁷ He does not even get time for deliberation, which is a vital factor in the making of decisions. When he is not himself an eye-witness of the occurrence, but acts on the basis of information supplied by others the risks are even greater; for before deciding, he has to weigh the probative value of information, judge the credibility of the informants, balance the

3. The limits of lawful arrest without a warrant vary considerably under the statutes and decisions of the different jurisdictions in the United States. Generally, a police man or peace officer may, without a warrant arrest a person under the following circumstances: (i) for a felony, committed or attempted in his presence; (ii) when a felony has in fact been committed and he has "reasonable" cause for believing the person arrested to have committed it; (iii) when he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should appear afterwards that no felony has been committed, that the person arrested did not commit it. Beyond this, generalisation ceases to be safe. At common law there could be no arrests for a misdemeanor without a warrant unless misdemeanor constituted a breach of the peace and was committed in the officers' presence. Many States have now extended the power of arrest without warrant to all misdemeanors committed in the officers' presence.

Commenting on the complexities of the law of arrest, a leading authority in the United States said that "it certainly would greatly simplify the law of arrest and prevent misunderstandings, if the historic distinction between the right to arrest for felonies and misdemeanors were abolished". (Warner, "Modern trends in the American Law of Arrest," 21 Can. B. Rev. 192, 204). The Indian Criminal Procedure Code has avoided the classification of offences into felonies and misdemeanors and to that extent the law has been simplified. As to power of the police officer to arrest without warrant, see Section 54 of the Code of Criminal Procedure of India (1898).

4. The Courts have had difficulty with the meaning of "reasonable cause" when the arrest is without warrant; Conceptually, the expressions "probable cause" and "reasonable cause" are equivalents, since the U.S. Supreme Court has applied the "probable cause" requirement of the Fourth Amendment to both searches and arrests, and any distinction between an arrest with or without a warrant would be violative of the spirit of the (constitutional) amendment. In actual practice, however the standards for an arrest without a warrant (or a search without a warrant) seem to be less than with one. If probable cause is not to be the test at the initial point of arrest, then where is the line to be drawn, short of indiscriminate police detention? As was pointed out by Foote, *Police detention and arrest privileges*, Jour. of Crim. Law, Criminology, and Police Science, Vol. 51, 407, 1960). "No greater service could be rendered than the formulation of specific standards illuminating the limits of the proposed buffer zone which would lie between arrest on probable cause and the protection of the individual from intrusion based on nothing more substantial than a police man's hunch".

5. How well are the ordinary police men qualified for this task? It is said that "there are few vocations which if adequately performed, require so much of a man—physical courage, tact, disciplined temper, good judgment, alertness of observation and specialized knowledge of law and procedure." (Harrison, *Police Administration in Boston*, Survey of Crime and Criminal Justice conducted by Harvard Law School, Vol. 111, P. 28). Investigations reveal that a substantial proportion of police officers are not at all fitted to cope with the complex problems that they have to face in the discharge of their official functions. A few years ago, the Mayor of Indianapolis introduced his appointee (as chief of police) with the remark, "I know that my man is going to be good chief, because he has been my tailor for twenty years. He knows how to make good clothes; he ought to be a good chief". Wickersham Commission Report IV, pp. 20-22 (1931).

6. The issuance of a warrant prior to arrest means for all practical purposes, that the decision to arrest and to prosecute have been made simultaneously. This being so, it is understandable that responsibility is shared by the police, prosecutor and the magistrate.

7. As to the Police discretion not to invoke the criminal process, see Joseph Goldstein, 69 Yale L.J. 542 (1959-60).

probabilities and determine the extent to which deviational conduct should be tolerated and law nullified⁸.

There is no other decision of comparable importance in terms of its immediate and ultimate consequences on the interests of the individual, in the whole criminal process, the power of making which is left solely to a single authority and attended by so few legal safeguards.⁹ Paradoxically enough, these police decisions to invoke the criminal process afford the least scope for lawyer's participation as the decision and arrest are made simultaneously.

But what happens when the decision to invoke the criminal process is made judicially prior to arrest?

Though the power to issue the warrant rests with the magistrate or commissioner and lies within the exercise of his judicial discretion, the basis of the decision is the information furnished by a private party or the police.¹⁰ The constitutional and statutory requirements of "probable cause" and "particular description of the person seized"¹¹, in the United States, for the issuance of the warrant are certainly safeguards provided by law to exercise this important power with care and caution. But these safeguards are likely—and judging from past experiences it has often been proved—to be ineffective, when we take note of the absence of the person accused of the offence in the scene and the willingness and anxiety on the part of the person accusing the commission of crime upon no greater and stronger basis than hearsay or upon personal interpretation that known facts constitute a criminal offence. This can happen even when the police officer is applying for the issuance of a warrant, when he acts in reliance of the information supplied by others. And when the description of the person is ambiguous¹², a totally different

8. The studies made in the United States, on the exercise of power of arrest by the police have revealed that "the great majority of arrests are illegal at their inception, continuance or termination". Warner, *The Uniform Arrest Act* 28 Va.L.Rev. 315 (1942). One writer indicates that of the 80,000 persons whose arrests are noted in the various surveys of criminal justice, nearly 48% were released by the police or by the magistrate without being discharged, Hopkins, *Our Lawless Police*, (1931) 34, Quoted Orfield, *op. cit.* See also Beeley, *The Bail System in Chicago*, (1927) Gluck, *Crime and Justice* 82 (1936).

In India, misuse of authority in this regard is considered to be one of the most reprehensible features of the administration of criminal justice. See comments made by Courts in *Emperor v. Rampriti Ahir and others*, A.I.R. 1926 Patna 560, *R. v. Madan*, 1885 A.W.N. 59 (F.B.) *R. v. Saindino Jakro*, A.I.R. 1934 Sind. 197.

9. It would seem that the victim of an illegal arrest has several remedies, but due to a variety of reasons they are nugatory in effect; among the reasons are: (i) the reluctance to penalise an officer for what appears to be good faith exercise of his authority; (ii) the difficulty of proving damages either because of the limited nature of the detention or the prior arrest record of the complainant; (iii) the interpretation of the bonds as applicable only to injury following from action within the authority of the officer; (iv) the general rule that the salaries of police (public) officers are not subject to garnishment, so that judgment against them become difficult to collect. See for discussion, Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 34 Chicago L.Rev. 345 (1936) Borchard *Governmental Liability in Tort*, 34 Yale L.J. 240 (1934).

10. The process is begun by the appearance before a judge, magistrate or a Commissioner of a person called the complainant, who makes written statement under oath of essential facts constituting the offence charged, and requesting that a warrant for the arrest of the accused may be issued. (Views differ as to whether the complainant is restricted in his complaint to state facts that he knows or whether he may include in it statement made to him or information obtained by him, with the added statement that he believes this information to be true. See *Giordarello v. U.S.*, 357 U.S. 480 (1958). If the magistrate finds that there is probable cause to believe that an offence has been committed and that the accused has committed it, a warrant for arrest is issued. Federal Rules of Criminal Procedure, Rule 4 (a); Perkins, *The Law of Arrest*, 25 Owa. L.Rev. 201, (1940).

The Indian provision is similar. See section 190 of the Code of Criminal Procedure of India and section 24 of the Indian Police Act.

11. "No warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing.....the persons to be seized". U.S. Constitution Fourth Amendment. Generally State Constitutions have like provisions; sometimes there is no such provision in the State constitution, but there is one by statute. See, American Law Institute Code of Criminal Procedure 173 (1931).

12. Some State Constitutions and statutes in the United States have phrased the requirement by providing that the person to be seized shall be described "as nearly as may be". It is obvious that such a description is insufficient to designate the accused with adequate certainty. The American Law Institute Code, however provides that the person to be arrested shall be described so that he can be identified "with reasonable certainty."

person, who has no connection whatsoever with the alleged crime, may be seized and subjected not only to the humiliation of the seizure but to the ignominy of a night in jail before the matters are straightened out. The probability is far greater in India, as the statutory provision relating to the issuance of warrant, does not contain any of the Safeguards noted above.^{12-a}

Unless prior to the issuance of the warrant the accused is summoned in Court, he would come to know about the decision to invoke the process against him, only at the time when he is taken into custody. The summoning of the accused will afford him an opportunity to answer the charges levelled against him with the assistance of the Counsel and for the Court to satisfy the probable cause requirement. It may also serve the notice giving function before the possible deprivation of a man's liberty and thus to avoid the inconveniences that would be caused by a surprise arrest¹³. At the same time, it is conceded that this course may not be possible not practicable in every case; circumstances may necessitate the immediate arrest of an offender or the prompt issuance of a warrant to make his arrest. But in cases where there are no such pressing reason, greater use of the summoning process in the first instance is an experiment worth trying.¹⁴

When the invocation of the process is made by the police, in many instances the officer, at the time when he is taking hold of a person, may not have the right or duty to effect an arrest. He may have suspicion against the person relating to the commission of the offence and the purpose of taking him into custody may be to elicit information from him or source of information so as to lay the basis for a subsequent arrest.¹⁵ In others, while the police may have reasonable grounds to believe that an offence has been committed, there may be a gap in the evidence requirements for the arrest on the one hand and for magisterial commitment on the other. This is probable also in cases where the arrest is made in pursuance of a warrant.¹⁶ Under all these circumstances the police and the prosecuting

12-a. Section 75 of the Code of Criminal Procedure of India, only provides that every warrant of arrest should be in writing and signed by the Presiding Officer of the Court. Schedule V, Form II, which gives the form of "Warrant of Arrest" also does not provide for any other specific safeguards.

13. "Indeed, the interest of the citizen in not being arrested unnecessarily is the inspiration for the tendency of modern criminal laws to provide that the alleged offender shall be brought into custody by a summons and not by arrest". Bohlen and Shulman "Arrest with and without a warrant", 75 U. of Pa.L. Rev. 485, 490.

14. The American Law Institute Code of Criminal Procedure provides for wide use of summons in stead of arrest, though it does not cover felonies. Only a minority of states to day allow a summons to be substituted by a warrant of arrest. Under Rule 4 (4) of the Fed. Rules of Criminal Procedure a summons instead of a warrant may be issued upon the request of the Attorney for the Government. For pleas in favour of this reform see Beeley, *The Bail System in Chicago* 13-22; Warner and Cabot, *Judges and Law Reform* 148-151.

In India, in the case of offences which are punishable for a term not exceeding one year, a summons is issued in the first instance section 4 (v) and (w) of Code of Criminal Procedure of India.

It is reported that the substitution of summons for arrest is widely used in Canada, and England and more widely in France, Germany and Italy. See Ploscowe, "Measures of Constraint in European and Anglo-American Criminal Procedure" 23 Geo. L.J. 762, 767. (1934-35).

15. The statutes authorise the law enforcement officials to make use of the provisions relating to arrest for purposes of prosecution only. But often they are faced with a situation in which they desire to detain individuals, so that they might conduct a further investigation. The main characteristic of an 'arrest' made for this purpose is that while grounds may or may not exist for the arrest, the police always lacks grounds for prosecution for the type of arrest which they suspect the arrestee to have committed.

Views differ as to whether a "temporary interruption of movement of a person for purpose of interrogation" is "arrest" or not in the legal sense of the term. The Court of Appeals stated in *Long v. Arc II*, 63 App.D.C. 68 at p. 71 that "..... the term 'arrest' may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued even for a short period of time". But see contra opinion in *Harry v. U.S.*, 361 U.S. 98, 104-106 (1959) Justice Black, (dissenting). See also Report of the Nat. Com. on Law Observance and Enforcement, p. 32-33 (1931).

16. When an arrest is made pursuant to a warrant (it is supposed that) the probable cause requirement for the arrest has already been looked into and judicially determined before the issuance of the warrant. Hence ordinarily, the evidence which sufficed for the issuance of the warrant, e.g., testimony of witness, real evidence etc., will be available when the duty to effect the arrest arose. Fur-

officers¹⁷ resort to a screening process of their own, usually prior to the production of the arrested person before the magistrate, even though statutes do not authorise such a practice.¹⁸

It is during this period of initial screening, that the primary agencies of law enforcement make decisions as to whether or not, or in what way the process has to be applied. If as a result of the questioning, the officials find that the suspicions mainly on the basis of which he was taken hold of, are unfounded or that provable evidence against him are insufficient to warrant a committal for trial or ultimate conviction they may decide to revoke their original decision and release him from custody. If on the other hand, they decide to continue the application of the process they may determine for instance, the nature and form of charge to be brought against him, whether a plea of guilty should be accepted from the accused on a lesser degree, whether settlement of the matter as between the parties is the better course of action to be adopted etc.,

1. *The scope for Counsel's participation :*

As has been indicated earlier, the procedure through which these decisions are arrived at, is marked by a total absence of supervision and lack of regularity and hence is productive of certain evil effects, which might prejudicially affect the rights of the defendant and also the final determination of his guilt or innocence. The possibility of putting pressure—physical as well as psychological—on the lone suspect¹⁹, who is shut out from the rest of the humanity, in order to obtain incrimi-

ther evidence, produced by routine police work, is likely to be added after arrest, and in the ordinary course of events the case is "sewed up tight" when it goes to trial. But "troublesome" cases may arise to disturb the cozy sequence of "ordinary course of events" especially when the evidence on the basis of which warrant was issued and arrest was made, later on proves to be worthless.

17. The practice to have a member of the prosecuting attorney's staff during the initial screening is common in the United States. By performing this function, the prosecutor's office feels that it properly plays an integral part in the actual investigation of the case. Perhaps more important, the members of the prosecutors' staff feel that statements taken by their office are less likely to be challenged as involuntary. In India, in many jurisdictions the prosecuting attorney appears on the scene only at the trial stage, with the result that the interrogating process is left exclusively to the police officials.

18. The statutes in the United States invariably require that arrested persons be taken to the Court "without unnecessary delay" "immediately" or "forthwith". (See American Law Institute Code of Criminal Procedure Commentary).

In the Federal jurisdiction after the establishment of the McNabb-Mallory rule which emphasised the duty of the federal officers to take arrested persons before a committing magistrate without unnecessary delay, the Courts indirectly attempt to enforce the 'prompt arraignment' provision by invalidating confessions obtained from the arrested person during the period of unlawful detention between arrest and arraignment. In theory this should have the desired effect; but how far this exclusionary rule has deterred the investigating officers from detaining the accused in their custody is open to doubt. Moreover the MacNabb-Mallory rule has only very limited application. The Supreme Court of the United States has refused to impose the above rule upon State Courts, and State Courts in their turn have rejected the rule, (with the exception of Michigan—*People v. Hamilton*, 359 Mich. 410 (1960)). It is not uncommon for the State Courts to sanction delay in arraignment by admitting a resultant confession. Often such sanction has been expressed in explicit terms, such as the following: "A long delay is not 'per se' fundamentally unfair.....the fact that the interrogation of the suspect continues until he confesses is not 'per se' a ground for invalidating his confession nor is it the fact that the interrogation lasted for a considerable period of time any ground for invalidating a confession, unless the interrogation was so long in duration as to amount mental or physical coercion and duress".

This has enabled the state officers to hold a person in custody under a semblance of legality for a varying period of time depending on the nature of the case, and the circumstances in which the arrest has been made. A projection of cases sampled in the A. C. L. U. study indicates that in 1956 approximately 20,000 defendants were held "incommunicado" for at least 17 hours in cases eventually brought before the nine branches of the municipal Court studied. Almost 2,000 of these defendants were held for 48 hours or more—*Secret Detention by Chicago Police*, report by the A. C. L. Union, III Illinois division, 1959.

For Indian law, see sections 61, 167 and 344 of the Code of Criminal Procedure of India (1898).

19. The availability and usability for self-incrimination in the United States in a very large proportion of cases (upto 90%) which are decided by pleas of guilty is a matter worthy of note in this connection. Contrast this figure with the negligibly low percentage of convictions obtained by other means. Does this readiness to enter pleas of guilty, indicate that these persons have been cajoled to do so, or whether it is due to the fact that they have seen that their interest would be best served in that way? How many of these persons have realised the seriousness and consequences of the decision?

nating statements from him, is one of the foremost among the dangers feared at this time. The exercise of the power of interrogation when there is no one to regulate, supervise or observe the proceedings would often beget forgetfulness of the just limitations of that power. The questioner himself determines whether a particular question should be answered and also what means should be used to compel an answer. Thus the right to interrogate would soon seem to be a right to get the expected answer *i.e.*, to a confession of guilt, and the simple and peaceful process of questioning may breed a readiness to resort to bullying and, to physical force and torture²⁰. Based on the ordinary observation of human conduct, enough has been verified to fortify the conclusion that under stresses some persons are likely to acknowledge guilt, even though they have not committed any offence. In the words of Justice Douglas:²¹

"Every man can be broken. There is a point when the nervous system can take no more pain, shock and fatigue, where it will pay any price for relief. A few minutes, a few days, or a few weeks, may be required depending upon the individual and the torture device that is employed. Once that point has been reached, the accused becomes for the moment putty in the hands of the police and will admit what they charge and sign what they want."

Thus whenever a person is placed in a situation in which the untrue acknowledgment of guilt is at the time more promising of the two alternatives between which he is obliged to choose, he would choose any risk even at the cost of falsely acknowledging the guilt in preference to worse alternatives associated with silence²².

The presence of the accused's Counsel during the period of interrogation will act as an effective restraint against these coercive practices. "One who feels the need of a lawyer and asks for one" according to Justice Douglas,²³ "is asking for some protection which the law can give against a coerced confession.... The third degree flourishes only in secrecy.... The mischief of third degree will continue as long as the accused person can be denied the right to counsel at this most critical period of his ordeal."

The appellate records, both in India²⁴ and in the United States²⁵ hold sufficient testimony to support the learned Judge's observation.

20. The pressure most commonly used in the past in the United States consisted the use of stark physical violence such as the blow of the fist in the jaw (*White v. State*, 93 Texas. Cr. 532), striking with the whip, (*Dickinson v. Commonwealth*, 210 Ky. 350), hanging (*Brown v. Mississippi*, 297 U.S. 278), etc. The most enlightening discussions on third degree practices—past and present—in the United States are contained in Hopkins, *Our Lawless Police*, (1931), National Commission on Law Enforcement and Observance. Report No. 11, Lavine, *Third Degree*, (1930) Barnes and Teeters, *New Horizons Criminology*, (1944) Kutz., *Trial by Torture*, (1938) 72 U.C.L. Rev. 316. In the United States there are innumerable statutes regulating the conduct of officers towards prisoners. (See Compilation of Statutes against third degree and other related evils in 'Lawlessness in Law Enforcement', Wickersham Com. Report, *op.cit supra* Appendix III and also McCormick, *Evidence*.) But these afford only incidental protection against such practices in securing confessions. The possibility that the Judge or Jury will find the confession extracted from the accused by these methods to be "involuntary" and hence inadmissible in evidence is also remote, because it is no easy matter for an accused to establish that force, especially of a psychological variety was used in obtaining a confessional statement from him.

With the passage of time, the use of stark physical force and other methods of torture have been replaced by more subtle forms of indirect pressure (like prolonged and protracted questioning conducted by a battery of questioners and operated in relays) by the investigating officials in the United State.

21. Douglas, "We The Judges", (1956) 362.

22. The plight of the accused under such circumstances has been convincingly portrayed by Justice Douglas (concurring) in *Watts v. Indiana*, 338 U.S. 49 (1949) at 56, 57.

23. *Crooker v. California*, (Dissenting), 357 U.S. 433 (1958).

24. For instance, see *R. v. Pramadha Nalha Bagchi*, 21 Crim. L.J. 266 (1926); *R. v. Garib Hari*, (1926) 30 C.W.N. 454, *Bhagan v. Pepsu*, A.I.R. 1955 Pepsu 33. *Ramachandra v. State*, A.I.R. 1957 S.C. 381.

25. Perhaps the most revealing of such instances in the United States in recent times is the case of Leslie Wakat. (*People v. Wakat*, 415 Ill 610 (1953); *Wakat v. Harib*, 253 F. 2 d. 59 (1953)

Even if physical force or pressure of a psychological variety are not used still incriminating statements could be obtained from the suspect by the use of trickery and deceit not amounting to compulsion²⁶. The holdings are unanimous in both the countries that the use of these means by the interrogators are not unlawful. The reasoning given by the interrogators, which the Courts appear to accept '*nolens volens*' is that :²⁷.

"In dealing with criminal offenders and consequently also with criminal suspects, the interrogators must of necessity employ less refined methods than that are considered appropriate for the transaction of ordinary, every day affairs by and between law-abiding citizens."

The experience in the United States shows that the use of such means for procuring confessions and other information will lead on to many difficulties at the time of trial.²⁸ There will be a conflict of evidence as to what exactly transpired during the interrogation, as to what the accused actually said and as to the circumstances under which he said or was coerced into saying it.²⁹ Here again the accused is in a sad plight. The problem as presented by Justice Black (dissenting) in *re Groban* :³⁰

"Behind closed doors he can be.....tricked or confused by the officers into making statements which may be untrue or may hide the truth by creating misleading impressions....he has no effective way to challenge his interrogator's testimony as to what was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of the accused's statement or on occasions may be deliberately distorted or falsified. While the accused may protest against these misrepresentations his protestations will normally be in

Wakat was arrested by the Chicago Police on September 21, 1946 for "investigation". Two days after, a relative learned his where abouts and his wife contacted an attorney who at once filed a petition for *habeas corpus*, on behalf of Wakat. The Court ruled that the detention was illegal and ordered his release. But the same day the police rearrested him again for investigation. For the next three days the police held him at the police station. Soon after his rearrest his lawyer attempted to confer with him. He went to the police station several times, but was refused admission. Throughout the period covered by the two detentions he was not charged with any crime. He was held without bail and without communication with the outside world. During this time Counsel tried to contact his client several times, but every time his attempt was unsuccessful. Six days after the original arrest, the suspect signed a confession for burglary. He was convicted mainly on the basis of the confession and sentenced for a twenty-year term. Seven years after, the Illinois Court ordered Wakat's release as it was proved that his confession had been extracted from him by a series of violent beatings. It was found that he was suffering from broken bones on his right hand, multiple bruises on his chest, arms and buttocks, shin and shoulders. A jury of the Federal Court later awarded him for the violation of his constitutional rights £15,000 by way of damages.

26. Confessions obtained by the use of fraud or deception or by the influence of intoxication or of drug have been held to be "voluntary". See Wigmore, Evidence, 841, 1048 (3rd Edition, 1940) Ann. A.L.R. (1102) 1931; John. M. Mcquire, *Involuntary Confessions*, 31 Tul. L. Rev. 125, 140 (1956-57).

Indian law provides that if a confession is other wise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of deception practiced on the accused. (Section 29 of the Evidence Act). Also, religious influence as an impulse productive of confessions, holdings in the United States and in India favour their admissibility. See Wigmore. Evidence 840; and section 24, Indian Evidence Act.

27. Fred. E. Inbau, *Police Interrogation—A Practical Necessity*, 52 Crim. Law. Crim. and Pol. Science, 16 (1960).

28. What kind of inducement, threat or promise will be regarded as a matter sufficiently persuasive to produce risk of false confession is not easy to define. (See generally Wigmore, Evidence, op. cit. Supra, 834-42 and 24-30 of 1 Evidence Act). Hence it is difficult to ascertain whether the inducement, threat or promise used in a particular instance exceeded the permissible means provided by law to make the resulting confession "voluntary".

29. Sometimes the interrogating officials record the process. In such cases the prosecution has a very powerful advantage when it comes to corroborating a challenged confession. The police can record without the knowledge of the accused, and also only that portion of the proceedings wherein the accused dictates his confession, omitting any prior or subsequent statement. They also can withhold a tape, if they think that its contents will be "damaging" to them. As to the admissibility of such recorded statements, see Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in Federal Courts*, 57 Col. L.R. 1113 (1957); A. Goldstein, *The State and the accused : Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149.

30. 352 U.S. 330 (1956).

vain. This is particularly true when the officer is accompanied by several of his assistants and they all vouch for the story."

Courts in the United States have resolved the issue in such instances in favour of the state by admitting the confession into evidence. Counsel's presence when the interrogation is in progress may obviate many of these difficulties; not only will that deter the interrogating officers from the practice of 'improper means' to extract confessions, but will also greatly reduce the hazards to him at the trial from the officer's misunderstanding, or twisting of the accused's statements or in using them out of context.

The main reason brought forward by those who justify the denial of an opportunity to seek Counsel's advice or his presence prior to or at the time of interrogation is that a lawyer "who deems his sole duty to protect his client whether guilty or innocent" will tell him not to make any statements to the investigating officers under any circumstances. One may find the most emphatic statement of this theory in the opinion written by Chief Justice Maxey, in the murder trial of *Comm v. Agerton*³¹:

"the only function Counsel could have at the time of the suspect's interrogation would be to instruct that the secret which the murderer possesses commences to possess him and that his guilty conscience exerts a tremendous pressure on his vocal faculties. This is especially true when shortly after the crime's commission there is a let down in the criminal's nervous energy, and remorse is on the ascendant. If a criminal desiring to release his troublesome secret is to be frustrated by the action of the state in providing him at that time with an advocate who will counsel silence, the number of unsolved American crimes will be greatly augmented for he who plans murderous assault does not plan to have it witnessed by any one except the victim and his lips the felon quickly and permanently seals."

Compare the above, with the reasoning given by Prof. Inbau who is one of the staunchest among the supporters of the theory that "interrogation is an indispensable instrumentality of justice." According to him:³²

"The principal psychological factor contributing to a successful interrogation is privacy.... Criminal offenders except those who are caught in the commission of crime, ordinarily will not admit their guilt unless questioned under conditions of privacy, for a period of perhaps hours.... This practical psychological requirement of privacy during interrogation calls for a consideration of the issue of an accused's constitutional right to counsel.... If the right is considered to exist immediately after arrest the interrogation opportunity for all practical purposes is gone...."

Whether interrogation of the suspect is indispensable in the investigative process or not, is one of the widely discussed questions³³ in the field of the administra-

31. 364 Pa. 464, 480; 70 A.W. 575, 583 (1950).

32. "Police Interrogation—A Practical Necessity" op. cit. Supra. See also for his views on the "necessity" of police interrogation. *The Confession Dilemma in U.S. Supreme Court*, 43 III L. Rev. 442 (1948), *Restrictions in the Law of Interrogation & Confessions*, 52 Nw. U. L. Rev. 77 (1957); "Fair Play" in *Crim. Investigations*, 3 Nw. Uni. Tri-quarterly No. 2, P. 3. (1961) Self-incrimination, (1950) 6, 7.

33. The investigating officials are unanimous in their opinion on the need for secret questioning. Some of the strongest expressions of this view came out in the United States, after the Supreme Court's *McNabb* and *Mallory* decisions. (*McNabb v. United States*, 318 U.S. 332 (1943), *Mallory v. United States*, 354 U.S. 449. Each was followed by unsuccessful attempts at legislative reversal and congressional hearings at which Law Enforcement Officials insisted that they could not function without the opportunity to interrogate arrested persons prior to their arraignment. For a summary of the views expressed at these committee hearings, see *The McNabb-Mallory Rule: Its Rise, Rationale, and Rescue*, 47 Geo. L.J. 1 (1959); Note, *Pre-arraignment Interrogation and the McNabb-Mallory Miasma*, 68 Yale L.J. 1003 (1959) Weisberg, *Police Interrogation of Arrested Persons*, 52 Journal of Crim. Law Criminology and Police Science 21, 27-28 (1961-62). For arguments against the continuance of secret questioning by the police, see *Secret Detention by the Chicago Police. A Report by the American Civil Liberties Union Illinois Division* (1959) *Memorandum on the Detention of Arrested Persons and Their Production Before a committing Magistrate*, prepared by some members of the Bill of Rights Committee of the American Bar

tion of criminal justice in the United States. It is not intended to enter into the discussion here, as it is felt to be beyond the purview of the present study.³⁴ We may however examine certain other pertinent points that arise out of the above assertive statements and on which the protagonists seem to put much emphasis.

Let us first take up the "requirement of privacy" a phrase which Prof. Inbau so fondly repeats and on which factor he seems to base his argument to bar Counsel's presence during interrogation. One may be tempted to ask whose privacy he is talking about and wants to be protected and that too for what purpose? Does the person taken into custody 'require' such privacy?

Traditionally privacy means, a state of being private or retired from company or observation and it connotes that the person or persons concerned has or have a desire to being in such a state, or at least they accept or approve of it. Prof. Inbau himself had compared the "requirement of privacy" during interrogation to that needed during the performance of a surgical operation.³⁵ A person who undergoes the operation knows fully well that it is being done for his own benefit and hence himself volunteers for the same. How could 'privacy' in the same sense be applied as a requirement for interrogation, where the person involved is held forcibly and 'incommunicado' without even being given an opportunity to communicate with his relatives, or friends or Counsel and when the avowed purpose of which is to extract incriminating statements from him?

"It is impractical" the experienced interrogator bluntly says, "to expect admissions or confessions to be obtained under circumstances other than privacy."³⁶ To that end, he urges the use of "less refined methods" and does not find it "ethically objectionable" the practice of various tactics which border on trickery and deception.³⁷ Another authority goes even further and advises that:³⁸

"Where emotional appeals and tricks are employed to no avail (the investigator) must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily, without relent, leaving the subject no prospect of sure ease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination."

These open pronouncements remind us of the solemn warning given by Justice Brandies, years before. The greatest dangers to liberty, he said,³⁹ "lurk in the

Association and submitted on May 15, 1944 to sub-committee No. 2 of the Committee on Judiciary, House of Representatives—(The memorandum apparently prepared by Prof. Chafee, is reprinted on (1944) 69, A. B. A. Reports 274 and in Documents on Fundamental Human Rights, 483. Of special interest are the opinions of experienced police officials. See Gasch, "Law Enforcement in the District of Columbia and Civil Rights, Address to the Twelfth Annual Conference, Nat. Civil Liberties—Claring House, Washington, D.C., and Kooker, *Ethics in Police Service*, (1957) 54, 55.

34. It is interesting to note in this connection an observation made by an experienced criminal lawyer regarding the results of such interrogation on the administration of criminal justice. "I have tried 130 murder cases and I have won 126 of them. Many of these cases were based as far as the prosecution was concerned on confessions extorted from the defendant by the "third degree". I have won almost all the cases in which such confessions were obtained. If it had not been for the dishonest methods used by the police towards these defendants, I could not have won 10 of these cases. In almost all these cases the police used illegal methods with the prisoners, deceiving, cajoling and bullying them. The jury saw that their methods had been unfair and acquitted the defendants who might have been convicted except for the police practice.—Quoted by Keedy. *E. R. Cases on the Administration of Criminal Law*, 1928, 38-43.

35. Inbau, *Restrictions in the Law of Confessions and Interrogations*, (1957) 52 Nw. U. L. Rev. 77.

36. Inbau, *A Police Interrogation—A Practical Necessity* op. cit. 18.

37. For the various methods employed at interrogation, see Fred Inbau and John Reid, *Lie Detection, and Criminal Investigation*, (1953) 142, 147, 151, 157, 159 etc.

38. O. Hara, *Fundamentals of Criminal Investigation*, (1955) 103.

39. (Dissenting) *Olmstead v. U.S.*, (1928) 277 U.S. 438, 460.

insidious encroachment by men of zeal, well-meaning, but without understanding." The insistence of the 'requirement of privacy' can be reckoned only as a camouflage for the use of improper means to obtain incriminating statements from the lone suspect.

Secondly, in the arguments noted above, while the conclusions arrived at are identical, there is an apparent inconsistency in the reasoning given for denying Counsel. Chief Justice Maxey—echoing strongly Wigmore's assertion⁴⁰—is confident that "the tremendous pressure exerted by the guilty conscience" makes a ready confession and that lawyer's interference would only frustrate him in his attempt to get relief from the "enormous pressure of guilt". On the other hand, Prof. Ingbau believes that persistent questioning under conditions of 'privacy' for a long period of time only will achieve the desired result and hence the presence of a Counsel will frustrate (more) the efforts of the interrogator rather than that of the accused. These views raise many fascinating questions about the phenomenon of confession and its correlation with the conditions of interrogation. How often do interrogations produce confessions and how often are confessions obtained without questioning? It would also be interesting to know how often questioning produces a confession of guilt from previous offenders? He is more likely to know of his right not to answer questions and to realise that the incriminating statements will be used against him. This might give an indication as to the possible effects of administering caution before or during questioning.

Thirdly, the above oft-repeated "advise-to-keep-the-mouth-shut" theory brings up an important question as to the scope of the privilege against self-incrimination and its exercise at the interrogation stage. Has not the suspect or accused the right to refuse to answer questions and to remain silent at that time⁴¹. If he has such a right, on what justifiable ground, objections can be raised in informing him of his right? Unlike in England,⁴² in the United States the police practices do not ordinarily include cautioning the suspects in custody before they are questioned; the decisions have also not required them to do so⁴³. Even in case there is such a

40. 3 Wigmore, *Evidence*, (1940) 3 d. Ed. 851 at 319.

41. In the United States, the federal Courts appear to be divided on whether or not, the silence of a person in custody, may be shown in evidence as an implied admission. There is respectable authority in both ways. The evidence was excluded in the following cases: *U. S. v. Bando*, 135 (2 d. Cir. 1943) & *Tep v. U.S.*, F. 2 d. 41 (1936), *Dickinson v. U.S.*, 65 F. 2 d. 824. In *Bram v. United States*, 168 U.S. 532, the United States Supreme Court held that the privilege extended to the police station. No Supreme Court ruling has discredited the *Bram* ruling. At the same time, the Court has not cited the case with approval. See, Note *The Privilege Against Self-Incrimination—Does it Exist in the Police Station* 5, Stan. L. Rev. 459 (1953), McNaughton, "The Privilege Against Self-Incrimination", 51 J. Crim. L. Crim. & P.S. 138 (1960).

42. In 1912, the Judges of the King's Bench at the request of the Home Secretary issued rules for the guidance of police officers. These rules were subsequently amended in 1918 and in 1930. Although these rules have not the force of law (*Rex v. Voisin*, L.R. (1918) 1 K.B. 531, 539), the English Courts insist that they be strictly observed before admitting statements made by accused persons while in the custody of police. (See *Taylor on Evidence* (12th Edition) 556-62). Although the rules are 9 in number the gist of them may be stated in two propositions: (i) When a police officer has made up his mind to charge a person with crime, he should caution him (in the usual terms), (ii) A person in custody must not be questioned. (Violation of these rules confers a discretion on the judge to exclude from evidence a statement made by the accused).

But it is not quite clear whether the Judges' rules are now being followed by the British police. See Devlin, *The Criminal Prosecution in England*, (1958) Prof. Glanville Williams, noted that judges at the present time "tend to wink at breaches of the rules, at any rate if the charge is a serious one, and that "it is no longer the practice to exclude evidence obtained by questioning in custody". Williams, *Questioning by the Police: Some Practical Considerations*, 7 Crim. L.R. 325, 328, (1960).

43. Weisberg, *Police Interrogation: A Practical Necessity*, op. cit. supra. 39. It is reported that in New Orleans (*U. S. v. Sigler*, 162 F. Supp. 256 (E.D. La. 1958) a new practice has been devised to inform the accused of his rights at the police station. A placard bearing the following information is prominently displayed in each police station. "Rights of Arrested Persons: These are some of our rights. Under the laws of the United States and the State of Louisiana—Right to call a lawyer,Right to use Telephone.....Right to Bail.....Right to remain silent.....". The Massachusetts Attorney-General has printed and distributed to police departments a pamphlet entitled "If you are arrested" for dissemination to arrestees.

rule, in the very nature of things—and as the English experience⁴⁴, shows—it will inevitably invite avoidance. The notion that the interrogator should precede questioning with a caution suggests that he should act to protect the interests of the suspect and at the same time attempt to obtain damaging statements from him⁴⁵. The significance and effect of warning depend on the emphasis and the spirit with which it is given. It does not require much imagination to realise, how easily a warning could become a meaningless ritual!

Lastly, it is incorrect to assume that in all cases, Counsel would advise the suspect or accused to “keep his mouth shut”. Since silence inevitably invites suspicion, it is not unreasonable to suppose that in many instances where the suspect is innocent, his lawyer would advise him to answer questions in order to clear himself as quickly as possible. Moreover lawyers, advice may be different, if he is present at the interrogation. It is one thing to dispense general advice to a suspect from whose interrogation the lawyer will be barred, and quite a different matter to Counsel silence to particular questions, when the lawyer hears them as they are asked.

Viewed in this light, lawyer's participation in the extra-judicial screening process, might prove to be of real assistance to the investigating and prosecuting agencies, instead of “hampering the effective administration of justice”. Firstly, in the presence of Counsel, the suspect or accused will be encouraged to speak and answer the questions put to him by the interrogators, fully and fearlessly. Coupled with the Counsel's clarifications and reasonings, such free and open talk might be helpful both in casting away the lingering doubts, from the minds of the law enforcement officers, about the suspect's possible involvement in the crime, as well as in convincing them, in other instances, of the futility of applying the process against him, on the basis of inadequate evidence. Secondly, if on the other hand, Counsel gets convinced, of the accuracy and sufficiency of the facts and circumstances which form the basis of the accusation against the accused, he might advise him to plead guilty to the offence charged, or to a lesser one, in consultation with the prosecuting officer⁴⁶. Thirdly, any statement obtained from the accused, in the presence of Counsel, will have greater value at the time of guilt determination, which might obviate the necessity for many of the present-day unpleasant and unhealthy verbal duals between the prosecuting and defence attorneys inside the Court room.

2. *The Extent to which Courts have Recognised the Right.*

(a) *In the United States :*

In the United States, the scope of the right to Counsel in this area has come up before the Courts for scrutiny invariably linked with the determination of the validity of confessions. The problem has been presented for the consideration of the Courts under more or less similar set of circumstances—to determine the admissibility of a confession or other incriminating statement obtained from the accused after subjecting him to prolonged interrogation in the absence of Counsel. This entanglement of the Counsel question with that of the validity of confessions—inevitable as it may be—has relegated the former to an issue of secondary importance for the consideration of the Courts in these cases.

As a result, the determination of the nature and extent of the right has often missed a chance to be considered in its proper perspective ; Whether an accused

44. See note 42 ante.

45. “The real significance of caution is that it is, so to speak, a declaration of war. By if the police announce that they are no longer representing themselves to the man they are questioning as the neutral inquirer whom the good citizen ought to assist ; they are the prosecution and are without right, legal or moral, to further help from the accused ; no man innocent or guilty need thereafter reproach himself for keeping silent, for that is what they have just told him he may do”. Devlin. *The Criminal Prosecution in England*” op. cit. supra note 86.

46. See generally, Newman, *Pitaking Guilty for Considerations: A Study of Bargain Justice*, 46 Crim. L. Cr. & P. & S. 709.

detained in police custody has a right of access to Counsel? How can he exercise such right effectively? What is the remedy if such right is denied to him?

(i) *Traditional Rule of Admissibility of Confessions and Denial of Counsel :*

In the United States, until very recent times the admissibility of confessions⁴⁷ was adjudged on their evidentiary trustworthiness, according to the conditions, attending their rendition⁴⁷. If a confession is not made under compulsion or by threats or inducements or by physical force, it would be reckoned to have been made "voluntarily" and hence admissible in evidence⁴⁸. If this "trustworthiness rationale is adopted as the basis of the evidentiary rule of admissibility of confessions, then the fact that Counsel was denied or was absent at the time of interrogation, by itself will not have much effect on the admissibility of the resulting confession, provided there is adequate corroborative evidence tending to establish the reliability of the confession. Before the entry of the United States Supreme Court, into the field by way of Fourteenth Amendment some State Courts had adopted this view. In *State v. Neubauer*⁴⁹, the Iowa Court said :

"As there is nothing in the record to indicate that the officers held out any inducement to the defendant to make any statement or employed any compulsion or artifice in securing it, we cannot see how the absence of an attorney representing the defendant, when he proceeded to make a confession of his own guilt can be regarded as affecting its admissibility".

Even in cases where Courts were convinced that denial of Counsel was clearly "unjust" in the particular instance, they had taken the same view. The observation made in *McCleary v. State*⁵⁰, an early case from Maryland, is an illustration. The Court said :

"The case has been unfortunately complicated by acts which cannot be regarded in any other light than an excess of zeal on the part of the prosecuting officers of Washington County. It is of course the right of the accused to be represented by Counsel of his own selection, and it is equally true that the State's attorney in this case did intercept, interfere, with and to a large extent prevented the accused from communicating with Counsel for which there can be no justification advanced; but the question is not the propriety or the impropriety of the action of the State's attorney, but the admissibility or otherwise of a confession made by the accused in this case. The fact that one accused of crime makes a confession unrepresented by Counsel has been in several cases, held to constitute no valid ground for the rejection of a confession."

(ii) *Due Process Imposition on the Law of Confessions and its effect on Right to Counsel:*

Since 1936, with the decision of the United States Supreme Court in *Brown v. Mississippi*⁵¹, a new development has taken place in the law relating to confessions. Since then the rationale of the law of confessions has become a constitutional issue. Starting from the above case the Supreme Court has built up an impressive line of authority to the effect that it is a violation of Due Process of law and therefore unconstitutional in the Federal and State Courts to contrive a conviction resting on confessions obtained by the use of improper methods of interrogation, whether or not such confession is "involuntary", under the traditional confession rule.⁵² In these cases the Court has weighed such circumstances as physical misstatement,

47. The Classic argument is presented in 3, Wigmore, *Evidence*, 822-826.

48. Rule 63 (6) of the *Uniform Rules of Evidence* and section 24 of the *Indian Evidence Act*.

49. 145 Iowa, 337 (1910).

50. 123 Md. 399 (1914).

51. 297 U.S. 278 (1936).

52. "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the due process clause even though statements contained in them may be independently established as true". *Rechin v. California*, 342 U.S. 165 (1952).

threats, deprivation of food and sleep, prolonged interrogation, incommunicado detention, failure of the police to warn the defendant of his right not to answer questions, failure to comply with prompt arraignment provisions etc.⁵³

But despite these developments, an articulate theory has not been devised which would adequately explain the results already reached in these cases or that would guide decisions in the future cases, presenting related problems. The "trustworthiness" doctrine, has not been discarded; still its memory lingers and stands in the way of the evolution of a new rationale.⁵⁴ It is said that the enforcement of "civilized standards of criminal procedure", is the aim of the requirement of Due Process. If this is the new basis, under what circumstances will a confession be invalidated? Is the criterion for the determination whether a certain circumstance does not conform to "civilized standards of criminal procedure," its unlawfulness? In that case, the presence of a certain set of circumstances which is unlawful by itself, in the procurement of confession would result in the invalidation of the confession obtained thereby. But the Supreme Court has not set such standards in the Fourteenth Amendment confession cases. The Court will take into consideration the "totality of circumstances" and the violation of a State or other unlawful practice adopted by the police in obtaining the confession may be reckoned only as one of the factors in the determination of the validity of the confessions. The same Due Process "minimum standard" has been applied in cases where the Counsel question has been raised linked with the validity of confessions.

(iii) Status of the Right under State Law :

It is also significant to note in this connection that in most of the States there is no statutory provision expressly stating that the defendant is entitled to right to counsel either retained or assigned—at this period⁵⁵. Only a minority of the States have provided for the right of the accused to confer with a lawyer appointed by him. They provide in effect that an attorney at the request of the person arrested or someone acting on his behalf be permitted under reasonable restrictions to visit the person arrested⁵⁶. Under no statute the law enforcement authorities are under an obligation to provide legal assistance to the accused, or to advise him of his right to Counsel or to inquire whether he desires to have Counsel immediately or at any time after arrest until the time for arraignment.⁵⁷ Even those States which have code provisions relating to the right⁵⁸, i.e. to reach or retain Counsel, a penalty

53. These decisions have been analysed in Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 Stan. L. Rev. 411 (1951); Allen, *Due Process and the State Criminal Procedures*, 48 Nw. U. L. Rev. 16 (1953). The cases are collected in Annot. 1 L. Ed. 2 d. 1735 (1957), Supp., 4 Ed. 2 d. 1833 (1960), and in note 2 to the Court's opinion in *Spano v. New York*, 360 U.S. 315, 321 (1950).

54. The cases have reflected disagreement within the Court about the purpose of the constitutional rule. The opinions have vacillated between the traditional trustworthiness rationale and an emphasis on enforcing "civilized standards" of police conduct. Compare *Gallegos v. Nebraska*, 342 U.S. 55 (1951) and *Stein v. New York*, 346 U.S. 156 (1953), with *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Watts v. Indiana*, 388 U.S. 49 (1949); *Spano v. New York*, 360 U.S. 315 (1959); *Blackburn v. Alabama*, 361 U.S. 199 (1960); and *Rogers v. Richmond*, 81 S. Ct. 735 (1961).

55. See section 39 of A.L.I. Code of Criminal Procedure and Commentary.

56. For instance, Arizona Rev. Code 1928, Sec. 493; Montana Rev. Code (1921), Sec. 117 44; Kansas Gen. Statute (1949) Sec. 62-1304 (a); Colorado, Rev. Stat., (1953) Chap. 38, Sec. 449-1; New Hampshire Rev. Stat. Annot. (1955) 594-16; Ohio Rev. Stat. Annotated. 1954, 2935-16.

57. However there are departmental regulations in most states providing for access to Counsel during police custody. For instance the Detroit Police Manual (Revised) Rules and Regulations, 1958, states that ".....Attorneys who claim to be Counsel for the prisoner, shall be allowed to see him if the prisoner desires such Counsel. The prisoner shall be brought from the cell to some place in the station where he may talk to his Counsel in private". (Section 60). The Metropolitan Police Manual (1958) of the District of Columbia goes a step further and provides that, "..... immediately upon an arrest being recorded at the station, inquiry shall be made of the prisoner, as to the persons he wishes to be notified of his arrest, and the station clerk shall at once make every reasonable effort to communicate with such person or persons, except when such action might defeat the ends of justice or entail expense to the District".

It is significant to note that the police officials are not obliged to let in the prisoner's Counsel, while the interrogation is in progress. The lawyer also cannot insist on his presence during the time of questioning.

58. The provision contained in the Kansas General statute may be taken as an example. It provides that ".....any person held in restraint of his liberty pending trial or held for investi-

is not provided for the statute's breach, the only exception being the Californian⁵⁹ and Illinois statutes. The right to have "assistance of Counsel for defence"⁶⁰ contained in the state constitutions, has never been interpreted to mean that the state owes a constitutional duty to provide Counsel for an accused—even in capital cases prior to being brought into Court. Thus in the majority of states, there is no right—constitutional or statutory—to have even retained Counsel and hence in these jurisdictions it is not unlawful to deny access to Counsel at this preliminary stage.

(iv) *Denial of Right to Counsel Becomes a Factor Affecting the Validity of Confessions:*

Although denial of Counsel was raised before the Supreme Court of the United States, as one of the grounds for invalidating the confessions obtained during pre-arraignment interrogation in some cases that followed *Brown v. Mississippi*⁶¹, it was in *Lisenba v. California*,⁶² that the question came up prominently for the consideration of the Court, under the Due Process clause. The defendant along with another was charged with the murder of the defendant's wife, almost a year after the alleged occurrence. He was arrested on 19th April, on an unrelated incest charge. The defendant claimed that after his arrest on incest charge, on 19th April, he asked for, and was denied permission to see his lawyer and that he was subjected to intensive interrogation for long periods during the two succeeding days. However, no incriminating statement was obtained from him at that time. Defendant was permitted to see his lawyer on 20th April, and he was represented by his Counsel at his arraignment on the incest charge on the next day. On 1st May, the co-defendant was arrested and confessed and the following morning the questioning of the defendant began in earnest by the District Attorney, his assistants and the police officers. He asked to see his retained Counsel but was told that the lawyer was out of town. The defendant's request for another Counsel was promptly denied. Towards the early hours of 3rd May, the defendant confessed⁶³, and this confession was received at the trial which resulted sentence in his conviction and sentence to death.

The question before the Court was, whether the use of the confession procured under such circumstances violated Due Process clause. The conviction was affirmed by a majority of the Court.⁶⁴ They assumed that the delay of two days in arraignment on the incest charge, his removal from jail for questioning and the refusal of his request to consult Counsel on 2nd May, were illegal acts under the Cali-

gation in any jail or other place of confinement in this state, shall be permitted upon request to immediately confer with an attorney of his choice in the same room, with such attorney and without any barriers between such person and his attorney and without any testimony or recording devices". Section 62-1304 (1949).

59. The Californian Statute provides, "The defendant must in all cases be taken before a magistrate without unnecessary delay and in any event within two days after his arrest, excluding Sundays and holidays and after such arrest any attorney at law entitled to practice.....may at the request of the prisoner to visit a prisoner or any relative of the prisoner so arrested who wilfully refuses or neglects to allow such attorney to visit the prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit a prisoner, when proper application is made therefor shall forfeit and pay to the party aggrieved the sum of 500 dollars to be recovered by action in any Court of competent jurisdiction". Section 825 of the Californian Penal Code.

60. The Courts have invariably given emphasis on the phrase "for his defence" and have construed the provisions to mean that the defendant is entitled to be represented and defended by Counsel only when put in jeopardy on trial. "The provision cannot be construed to mean that one accused of crime shall have the benefit of Counsel to advise him as to whether or not he shall confess.....no decision of the Supreme Court of the United States has been cited to us and we have found none holding that a state owes a constitutional duty to provide counsel for one accused of murder from being brought before the Court". *Comm. v. Bryant*, 367 Penn. 135, 147, 79 A. 2d. (1951). See also *State v. Murphy*, 87 N.L.J. 515; *State v. Cole*, 136 N.J.L. 600; *State v. Turz*, 13 N.J. 203, Md. 213 (1953); *State v. Grillo*, 11 N.J. 173, 175 (1952); *Comm. v. Agerton*, 367, Pa. 464, 480, (1950).

61. Op. Cit. Supra.

62. 314 U.S. 219, (1941).

63. The defendant made some damaging admissions, at a restaurant, where he was taken after hours of interrogation. Upon his return to the District Attorney's office he made a full statement. 314 U.S. 243.

64. Justice Black and Douglas dissented, *Ibid.*, 241.

fornian law, but the Court refused to set aside the conviction solely because the state had engaged in unlawful acts⁶⁵ in the procurement of the confession. The Court said:⁶⁶

"We disapprove the violations of law involved in the treatment of the prisoner, and we think it right to add that where a prisoner held incommunicado, is subjected to questioning by officers for long period of time and deprived of the advice of Counsel, we shall scrutinise the record with care to determine whether by the use of his confession he is deprived of his liberty or life through tyrannical or oppressive means. . . . But the illegal acts as such committed in the course of obtaining a confession, whatever their effects on the admissibility under the local law, do not furnish an answer to the constitutional question we must decide. The effect of the officer's conduct must be appraised by other considerations in determining whether the use of the confessions was a denial of the Due Process."

In effect, the case only set down the rule that denial of Counsel during pre-arraignment interrogation period is a factor to be taken into consideration in determining, whether or not a confession was made voluntarily. If the scrutiny of the records reveals that other factors, which when combined amount to a failure on the part of the state "to observe that fundamental fairness essential to the very concept of justice," then the conviction will be set aside.⁶⁷

The vagueness and uncertainty of this rule and the difficulty of its application may be illustrated by taking up two cases that followed the *Lisenba case*.

In *Haley v. Ohio*⁶⁸ the defendant was a Negro boy of fifteen years. He was suspected along with two others of a robbery-murder and was arrested in his home around midnight. He was questioned at the police headquarters until 5 A.M., when he confessed. He was never advised of his right to consult with lawyers. From the time of his confession, for a period of three days he was held 'incommunicado.' An attorney retained by his mother twice attempted to meet the boy, but was refused admission by the police. At trial the confession was admitted and the defendant was convicted and sentenced to life imprisonment. On appeal the Supreme Court reversed the conviction. Mr. Justice Douglas emphasised defendant's youth, the time of the day when he was taken and questioned, the duration of questioning, the absence of Counsel, the "callous attitude" of the police as evidenced by the refusal to permit an attorney to see the defendant, and then added:⁶⁹

"What transpired would make us pause for a careful enquiry if a mature man were involved. And, when as here, a mere child—an easy victim of law—is before us special care in scrutinising the record must be used. . . . A 15-year-old lad, questioned through the dead of the night by relays of police, is a ready victim of the inquisition. Mature men might possibly stand the ordeal from midnight to 5 A.M. But we cannot believe that a lad of tender years is a match for police in such a contest. He needs counsel and support, if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him. No lawyer stood guard to make sure that the police went so far and no further, to see that they stopped short of the point where he became the victim of coercion."

Justice Frankfurter joined in the reversal of the judgment. The dissenters, Justice Burton, Chief Justice and Justice Jackson, stressed that the question at issue was not that of violation of civil rights, but the voluntariness or otherwise of the confession made by the accused. According to them, it could not be said on a perusal of the trial records that improper means had been employed by the police in obtaining the confession.⁷⁰

65. Section 825 of the Cal. Penal Code, note 59, ante.

66. 314 U.S. 219, 240.

67. *Ibid.*, at 235, 241.

68. 332 U.S. 596 (1948).

69. *Ibid.*, at 599-600.

70. *Ibid.*, at 620.

In the second case *Gallegos v. Nebraska*⁷¹, the defendant, a thirty-eight-year-old Mexican farm hand, who could neither speak nor write English, while being detained by the police in Texas, at the request of the United States Immigration Service without a charge and arraignment, confessed to killing his paramour in Nebraska. Thereafter he was taken to Nebraska, where he repeated his confession. Twenty-five days after his arrest and fifteen days after his arrival in Nebraska, he was brought before a magistrate for the first time. No effort was made during the entire detention to inquire whether he needed counsel, nor was he advised of his right to counsel. At trial, his confession was admitted in evidence. His conviction for manslaughter was affirmed by the Supreme Court of Nebraska. The question presented before the Supreme Court of the United States was, whether a confession and a plea obtained from a prisoner during a period of twenty-five days if illegal detention by federal and state officers before being brought before a magistrate and without counsel was admissible in evidence or not.⁷² Six members of the Court upheld the conviction, as not violating Due Process. Speaking for the majority, Justice Reid argued that,⁷³ "Prolonged detention without a charge of crime, or without preliminary appearance before a magistrate, the lack of counsel before, during or after arraignment, and confession to the police in private, are, however elements, that should be considered in determining whether a confession, permitted to be introduced or relied upon at a trial has been obtained under such circumstances that its use violates due process." But these facts even taken as a whole are not sufficient to show that the confession was not voluntarily made, for he said, "in recent cases, where undisputed facts existed far more likely to produce involuntary confessions than those in this case, there was disagreement as to whether due process was violated." The facts here, to support a claim of denial of due process, are not so convincing." Justice Black with the concurrence of Justice Douglas, dissented on the ground that the Constitution forbids the use of confessions obtained by the kind of secret inquisition described by the record.

However the Supreme Court waveringly followed the rule in *Lisenba* and set aside the convictions, where the undisputed evidence showed in addition to lack of a counsel other related factors such as actual or threatened physical violence,⁷⁴ prolonged and persistent questioning⁷⁵, fear induced by atmosphere of undue violence,⁷⁶ fraudulent tactics on the part of the questioning officers,⁷⁷ disadvantage due to youth⁷⁸ or by low mentality⁷⁹ or by insanity.⁸⁰ In some cases where the convictions of state Courts were reversed because of circumstances which are violative of the Due Process and it was obvious from the reports that counsel was not even mentioned as a determining factor.⁸¹ In some instances where the confessions obtained during the absence of counsel were held to have been made voluntarily, the Court emphasised the fact that the prisoner did not request legal assistance even though the counsel retained by the prisoner or relatives sought to meet his client while the interrogation was being carried on, as a ground for rejection.⁸²

71. 342 U.S. 55 (1951).

72. *Ibid.*, at 59.

73. *Ibid.*, at 65.

74. *White v. Texas*, 310 U.S. 530 (1940); *Malinski v. New York*, 324 U.S. 442 (1942).

75. *Ward v. Texas*, 316 U.S. 547 (1947); *Watts v. Indiana* 338 U.S. 49 (1949), *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Harris v. N. Carolina*, 338 U.S. 68 (1949).

76. *Payne v. Arkansas*, 336 U.S. 560 (1958).

77. *Leyra v. Denno*, 347 U.S. 556 (1954).

78. *Haley v. Ohio*, op. cit. Supra.

79. *Fikes v. Alabama*, 352 U.S. 596 (1948).

80. *Blackburn v. Alabama*, 361 U.S. 199 (1960).

81. For instance, *Ashcraft v. Tennessee*, 332 U.S. 143; *Chambers v. Florida*, 309 U.S. 227.

82. In *Stroble v. California*, 343 U.S. 197, while the defendant was being held by the police, prior to arraignment a lawyer tried to see him. The police refused the lawyer's repeated requests and it was only after a confession was recorded that he was allowed to meet his client. The Court made special reference about the fact that the defendant did not himself ask for Counsel.

(v) *Effect of McNabb-Mallory rule on Counsel question :*

In federal Courts, in the meantime the counsel question at the pre-arraignment period, took a different turn with the establishment of the McNabb-Mallory rule.

Before the *McNabb case*,⁸³ in all cases that came up before the federal Courts, where the absence of counsel or refusal of an opportunity to communicate with retained counsel had been raised as a ground for rejecting the confession, the federal Courts had also taken the view that denial of counsel could not be considered as the sole ground for invalidating it. Where it was brought up as a constitutional issue, it was held that denial of counsel at the time of arrest or immediately after that prior to arraignment, is not an infringement of a constitutional right which would warrant the release or the discharge of the prisoner on a writ of *habeas corpus* where there are sufficient grounds for his detention.

In *McNabb case* the Supreme Court of the United States held that incriminating statements obtained from an accused person illegally detained between arrest and arraignment in violation of Rule 5-a of the Federal Rules of Criminal Procedure, which requires prompt arraignment, are inadmissible in evidence. In the subsequent *Mallory v. United States*⁸⁴, which reaffirmed the McNabb rule, the Supreme Court emphasised that the policy underlying the federal prompt arraignment provision is to do away with the coercive interrogation practices and explained that prompt arraignment contemplates a procedure that allows arresting officers little more leeway than the interval between arrest and ordinary administrative steps required to bring the suspect before the nearest available magistrate. This rule in a way has short-circuited the inquiry into the effect of denial of counsel on the resulting confession in federal Courts.

But it has to be remembered that the above doctrine is not a constitutional requirement insisting on prompt arraignment but only an evidentiary rule governing the admissibility of confessions. The exclusion of a confession or other incriminating evidence obtained during unlawful detention is not by itself an insurance against the evils of the interrogative process. It need not necessarily discourage the police from detaining suspects and interrogating them, for they may still have the expectation to obtain other "vital information", though inadmissible in evidence, which might give them clues for investigation.

(vi) *Crooker v. California*⁸⁵ and *Cicenia v. Legay*⁸⁶—

This was the state of law when in *Crooker v. California*⁸⁵ the Supreme Court was presented with the problem, whether denial of counsel during pre-arraignment interrogation, would 'per se' violate, Due Process clause of the Fourteenth Amendment so as to require the exclusion of an otherwise voluntary confession.

The defendant Crooker, was a thirty-one-year-old college graduate who had attended the first year of the law school. He was arrested on a suspicion of murder, and was taken to the police station and asked to take a lie-detector test. He refused to submit to the test and indicated, that he wanted to call an attorney. Permission was denied. Interrogation began after a few hours and before and during the interrogation, he asked several times for an opportunity to get an attorney, naming a specific lawyer whom he thought might represent him. He was told that after the investigation was concluded, he could call an attorney. He was however informed of his right to remain silent by the police and refused to answer certain questions. Fourteen hours after arrest, he submitted a written confession, on the basis mainly of which he was convicted and sentenced to death.

83. *McNabb v. United States*, 328 U.S. 332 (1942).

84. 354 U.S. 449 (1957) in both these cases denial of Counsel was not raised as an issue by the defence.

85. 357 U.S. 433 (1958).

86. 357 U.S. 504 (1958).

The petitioner contended before the United States Supreme Court that he was denied Due Process on two grounds: Firstly, by the refusal of the investigating officers to allow him to consult with an attorney upon request being made to do so⁸⁷. Secondly, by the admission into evidence of a confession made by him while he was in custody and was not allowed to consult with an attorney which he requested to be allowed to do⁸⁸.

Conceding to the petitioner's argument, the Court also made a distinction between "state denial of a specific request for opportunity to engage counsel" and "failure to appoint counsel" upon arrest, and agreed that coercion is more likely to result from the former. The Court acknowledged further that:⁸⁹

"State refusal of a request to engage counsel violates the due process not only if the accused is deprived of counsel at trial on the merits—but also if he is deprived of counsel for any part of the pre-trial proceedings, provided that he is too prejudiced thereby as to infect his subsequent trial with an absence of that fundamental fairness essential to the very concept of justice."

But the majority held that under the circumstances of the case, it was not shown that the defendant was "prejudiced", as it was a case of "voluntary confession by a college educated man." Then the Court took up the first contention raised by the petitioner.⁹⁰

"The petitioner would have every state denial of a request to contact counsel be an infringement of the constitutional right without regard to the circumstances of the case. In the absence of any confession, plea or waiver or any other event prejudicial to the accused—such a doctrine would create complete anomaly, since nothing would remain that could be corrected on a new trial. Refusal of state authorities to contact counsel necessarily would then be an absolute bar to conviction.... Due Process, a concept "less rigid and more fluid than those ever envisaged in other specific provisions of the Bill of Rights.... demand no such rule."

In this connection, it may be pointed out that in an earlier case, *Chandler v. Fretag*⁹¹, the Court had held that "without regard of whether an accused is entitled to the appointment of counsel, his request to counsel of his own choosing is unqualified." If that is the case, should denial of such a right be depended upon the existence of other "prejudicial circumstances", in order that he can obtain a remedy? And also how could the majority opinion reconcile with the Court's pronouncement in *Glasser v. United States*⁹², that "the right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in nice calculations as to the amount of prejudice resulted from its denial."

If Crooker was not 'prejudiced' by denial of counsel on account of his college education and law school training, the defendant, in the next case, *Cicenia v. Legay*⁹³ had neither of these qualifications. He appeared at the police station, pursuant to a request from the police and upon the advice of his attorney, in connection with a robbery-murder that had occurred two years before. His brother and father accompanied him, but he was separated from them upon his arrival at the police station. Shortly thereafter, he was removed to another place. His lawyer immediately asked to see him, but his request was refused. Counsel repeated the request at intervals while the interrogation was going on; but without success. During the period the petitioner who was being questioned intermittently by the police, asked to see his lawyer several times. These requests were also denied. Lawyer and client were permitted to confer only after the defendant had made and

87. Petitioner's brief before the Supreme Court, 2.

88. *Ibid.*, 7.

89. 357 U.S. 433, 439 (1958).

90. *Ibid.*, 440.

91. 348 U.S. 3, (1954)

92. 62 S.Ct. 457 (1942)

93. *Op. cit Supra.*

signed a written confession. The Supreme Court affirmed the dismissal of the writ of the *habeas corpus* and reiterated the position taken in *Crooker case*⁹⁴. But the Court did not indicate why the circumstances of the case did not "prejudice" the defendant.

The Court of Appeals (9th circuit) in *Griffith v. Rhay*⁹⁵ while distinguishing the circumstances of that case from those of *Crooker* and *Cicenia*, pointed out that in *Cicenia*, the defendant was obviously advised of his rights, since he had consulted counsel before appearing at the police station.

The defendant in *Griffith v. Rhay*⁹⁵ was a nineteen-year-old boy who had had little formal education and was emotionally unstable. He was suspected of murder and he was interrogated while he was under the influence of a narcotic and analgesic drug. He was warned at the outset by the prosecuting attorney that anything he said could be used against him but he was not told that he did not have to answer nor was he asked if he had an attorney or wished to consult one. The defendant did not request the services of a lawyer. The state Court accepted the confession obtained as a result of the interrogation and convicted the defendant.

On a *habeas corpus* proceeding, the Court of Appeals held that under the circumstances, Griffith was "prejudiced" by not having the advice of counsel, since there was no indication that he knew of his rights to keep silent. Counsel, the Court added, would have advised him of his rights and in view of his physical conditions, the effect of the drug and the seriousness of the charge and penalty, would probably have urged him to refuse to talk. As for the defendant's failure to request for counsel, it was held that it could not be treated as a waiver, since there was no indication that he had known about this right and he had also not been in a physical and mental condition which would enable him to intelligently and competently waive the right. The decisions in *Crooker*, *Cicenia* and *Griffith* taken together will lead one to conclude that a suspect in police custody, who does not know of his right to remain silent has a right to be advised by counsel before his interrogation. If he does not request for counsel, such failure would support his argument that he did not know of his rights. In that case, a prisoner who does not request for counsel would be in a stronger footing than one who seeks counsel, as in *Crooker* and *Cicenia*.

(vii) Denial of Right to Counsel during Post-Indictment Interrogation :

In all the above cases, counsel was denied during the time of interrogation of a person who has not been formally charged with an offence. Would there be any difference, if the request of a person, who has already been indicted of an offence to communicate with his counsel, is not granted during interrogation?

In *Spano v. New York*⁹⁶, the defendant was indicted by a grand jury for first degree murder on the basis of eye-witness evidence. At that time the defendant was still at large. He had retained counsel and surrendered to the police in the company of the attorney who cautioned him not to answer questions. Immediately after he was left to the custody of the officers, questioning began and it continued throughout the night by a battery of interrogators led by the Assistant District Attorney. At first, heeding to the advice of his counsel, the defendant refused to answer any questions. But after eight hours of persistent questioning, the defendant at last confessed. During this time on several occasions, the defen-

94. The majority (5-3 this time, Justice Brennan did not join the dissenters) shared the "strong distaste" expressed by the records. They said that "were this a federal prosecution, we would have little difficulty in dealing with what occurred under our general supervising power over the administration of justice in the federal Courts", but refused to hold that "what happened here has violated the Constitution of the United States."

95. 282 F. 2d. 711 (9th cir 1960)

96. 360 U.S. 314 (1960)

dant requested permission to speak to his retained counsel; but these requests were not granted.⁹⁷ At the trial, the confession was admitted in evidence by the State Court over his objection, and he was convicted and sentenced to death.⁹⁸ Before the Supreme Court, the petitioner, in his contention, made a distinction between pre-and post-indictment interrogation, and raised the question, whether a person who has already been indicted, but detained in police custody without arraignment before a magistrate and is subjected to interrogation, is entitled to have access to counsel, and if a communication with retained counsel is denied whether it is violative of the Due Process clause?

The Supreme Court reversed the judgment of the State Court. The "totality of the situation" was considered and the confession was found to be involuntary because "the petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused."⁹⁹ But the majority opinion evaded the question presented before the Court. The Court refused to pass on the defendant's right to counsel as a separate constitutional issue, since the case could be disposed of under "traditional principles"; but accepted that post-indictment deprivation of counsel was an important element to be considered in the determination of coercion.¹⁰⁰ Justice Douglas and Justice Stewart in separate concurring opinions, stressed the fact that having passed the indictment stage of the proceedings, the defendant had an "absolute" right to counsel¹⁰¹.

If Due Process demands that post-indictment interrogation should not be conducted without counsel, or at least, that counsel should not be denied during such interrogation when he has retained counsel, it answers the question whether the right is operative at any point prior to the initial production of accused before a judicial officer. This seems to be the view taken by the New York Court in the recent case, *People v. DiBiasi*¹⁰², where it was held that "after indictment the right of attorney is absolute and that questioning him after indictment in the absence of his attorney is a violation of his right to counsel."

But the primary issue, to which the Courts should have focused their attention in *Spano and DiBiasi*¹⁰³ was the legality of the post-indictment interrogation itself. Even if it is conceded, that a questioning is "necessary" before bringing a formal charge against a suspected person, is there any valid justification in subjecting a person, who has already been indicted of an offence, to the interrogative process? Once a decision has been made to apply the criminal process against a person, it is the task of the police and prosecuting agencies to collect the necessary evidence to support and sustain the accusation against him. Extracting a confession or other information, after subjecting him to inquisition, is of course the short-cut open, and hence such method has its own attraction to the officials. But if the presumption of innocence, which is supposed to be the cornerstone of our systems of criminal jurisprudence should have any relevance in our procedure in actual practice, it should at least commence from the time when a person has been formally charged

97. At the trial the detective testified that he could not find the attorney's name in the telephone book. On this point the Supreme Court said "How could this be so, when the attorney's name..... was concededly in the telephone book. The trial Court sustained objections by the Asst. District Attorney to questions designed to delve into the mystery." 360 U.S. at 318.

98. The majority in the State Court found the confession to have been made voluntarily. They held that there had been no denial of right to counsel since that right commences in New York only upon arraignment. The dissenting judges, however, pointed out that the defendant when questioned was not a suspect, but in fact was a defendant held over under Court process and awaiting trial.

99. 360 U.S. at 323.

100. *Ibid* at 320, 322-23.

101. *Crooker and Cizenia* were distinguished as dealing with suspects and not with a man who has been formally charged with a crime. Both the opinions emphasised two aspects of the case: (1) that it was a capital case, and (11) that the denial of counsel came after the defendant's repeated requests to see his lawyer.

102, 103. 7 N.Y. 2d 544. (1960). It may be noted, that in this case there was no evidence of the use of coercion, physical or psychological on the accused. In fact the defendant responded to questioning freely and voluntarily. He never asked or was denied permission to see his lawyer.

with the crime. And at least from that point onwards, evidence against himself should not be expected to come from his own mouth. There is no justification whatsoever under our systems, to subject a person to inquisition after having indicted him with the offence. Post-indictment interrogation should not be tolerated under any circumstances and hence—whether it was conducted with or without counsel—it should have been held illegal.

To summarise, absence or denial of counsel during interrogation prior to arraignment, is not violative of the Due Process clause of the Fourteenth Amendment; but it is a factor to be considered, which may in a certain case be decisive in the admissibility of confessions. The denial must so "prejudice" the defendant "as to infect his subsequent trial with an absence of that fundamental fairness essential to the very concept of justice" and this would depend on the facts and circumstances of each case. This is the Due Process minimum standard, for state police activities; each state being free to demand higher standards from its law enforcement officers. In the states the laws vary widely ranging all the way from denial of either retained or appointed counsel, to criminal penalty provisions against officers who fail to grant an arrestee the right to consult with retained counsel. But absence of denial of counsel during the period prior to the production of accused before a judicial officer except during post-indictment period in New York,—has never been held by the State Courts as the determining factor for the rejection of evidence obtained thereby, and no effective remedy is made available if the right is denied, even in those States which have statutorily recognised the right at this stage.

(b) *In India :*

Courts in India, especially the lower judiciary were reluctant in the earlier days to extend the statutory right¹⁰⁴, contained in the Code of Criminal Procedure to the pre-trial detention period. Until 1926, there was no uniformity as to the accused's right to seek the advice of a lawyer (retained by the accused himself, or his relatives) while he was being detained by the police during the course of the investigation¹⁰⁵. In *Re Llewelyn Evans*¹⁰⁶, the Bombay High Court took the lead in recognising the accused's right to have access to lawyer during such period. The statutory provision was interpreted to mean that the accused should, "not only be at liberty to be defended at the time of judicial proceedings, but also that he should have reasonable opportunity if in custody of getting into communication with his lawyer," and therefore it was held that "at least from twenty-four hours of arrest that he appears before Court this right begins".¹⁰⁷

Soon the principle laid down by the Bombay High Court was followed by the Lahore High Court in three subsequent cases¹⁰⁸, in which the counsel question came up in identical circumstances. In *Amolak Ram v. Emperor*¹⁰⁹, the Court ruled that a person "who is arrested merely on suspicion" is also entitled to have legal access when in police custody. But it is not quite clear, whether this referred to the period prior to his production before a magistrate.

This was the nature of the right at the time when the Constitution came into effect. The constitutional provision,¹¹⁰ it seems, has extended the right to the period immediately following arrest and prior to the accused's production before the magistrate. In *Moti Bai v. State*¹¹¹, the Rajasthan High Court while explaining the scope of the right under Constitution—the issue before the Court was again denial of the

104. Section 340 of the Code of Criminal Procedure of India (1893).

105. See conflicting opinions in *Queen Empress v. Vasudeo*, (1899) 1 Bom.L.R. 856 and in *Harinaray v. Emperor*, (1919) A.I.R. Cal. 383.

106. A.I.R. (1926) Bom. 551.

107. *Ibid* at 554.

108. *Sunder Singh v. Emperor*, (1930) A.I.R. Lah. 945.

109. A.I.R. (1932) Lah. 13.

110. Article 32 (1) of Constitution of India, 1950.

111. A.I.R. (1954) Raj. 241.

right during interrogation after the production of the accused before a magistrate—observed that “ever since his arrest, the accused has a right to be consulted by a legal adviser of his own choice and to be defended by him”.¹¹²

The difference in the circumstances under which the issue of right to counsel at the time of police screening has been brought before the Indian Appellate Courts, in the few cases surveyed above, cannot escape our notice. Firstly, in all the above cases the Courts were concerned with the question of right to counsel of the accused who has already been produced before the magistrate.¹¹³ Secondly, unlike in the United States, absence or denial of counsel has not been raised as a circumstance for invalidating a confession obtained as a result of such interrogation¹¹⁴.

Do the scarcity of cases in this area, and the factors mentioned above, indicate that the exercise of the right to counsel at this crucial stage, does not pose to be an important problem in India, because of the difference in the evidentiary rule governing the admissibility of pre-trial confessions and the procedural provisions regarding the “prompt” production of an arrested person? The procedural and evidentiary laws in India governing this area differ from those of the United States in two respects. One, the Indian Code of Criminal Procedure has restricted the period of detention of an arrested person in police custody, prior to his production before a magistrate to twenty-four hours at the longest, excluding of course, the time necessary for the journey from the place of arrest to the Court¹¹⁵. Two, the evidentiary rule in India has made inadmissible any confession made to, or in the presence of a police officer.¹¹⁶ When these provisions are taken together—one procedural and the other evidentiary—it would seem that the Indian law has successfully taken away the opportunity for detention in police custody, and has rendered such detention and interrogation “fruitless”¹¹⁷.

But a closer look at some of the related statutory provisions may not sustain such a cheerful assumption. Although the procedural law has fixed a twenty-four-hour-limitation for detention prior to the production before magistrate, it authorises the magistrate to sanction for further detention for a period of fifteen

112. *Ibid* at 242.

113. But this does not mean that detention and questioning without or prior to production before the Magistrate is not common in India.

114. In an early case, the Lahore High Court had the occasion to examine the question of right to counsel during the “pre-arraignment” period of detention and questioning. In *Jahangiri Lal v. Emperor* (A.I.R. 1935 Lah. 230) one of the accused (who later on turned approver) in a conspiracy case was arrested and was subjected to intensive interrogation and a highly incriminating statement was obtained from him. The arrest took place on 25th of August and the accused commenced to make his statement on the 28th and finished on the 2nd of September. But detention in police custody continued and questioning was conducted at intervals and supplementary statements and notes were recorded from time to time and were attached to the first statement. Finally a consolidated statement which incriminated himself and a host of others was prepared by the police which the accused learnt by heart and it was rendered before the Magistrate. Similar confessions were recorded from the other accused after varying periods of detention. During these periods all of them were held “incommunicado” and the questioning was conducted at different places which had no connection with the offences charged against them. In the mean time several applications were made to the police authorities by lawyers retained by the relatives and friends of the accused. Mainly on the basis of the confessions and the approver’s testimony, they were convicted and sentenced to various periods of imprisonment. The High Court partly allowed the appeal and observed as follows:

“The rulings of this Court are clear that an under-trial prisoner is entitled to communicate with his relatives and friends. These rules cannot be evaded by removing the accused from place to place so that nobody knows where he is, and his relatives and friends cannot communicate with him and legal assistance cannot be availed of. The matter is really reduced to a farce, if interviews are allowed only after a confession has been recorded.... Speaking for myself, I can only say that in future I shall look with suspicion all confessions obtained when the accused has been so confined, and where interviews with counsels or friends or both have been evaded.”

115. Section 61 of the Code of Criminal Procedure of India (1898). The Constitution of India has given recognition to this right under Article 22 (2).

116. Sections 24 and 25 of the Indian Evidence Act (1872).

117. See for instance the comments made by Douglas in “We the Judges” (369-373).

days in police custody¹¹⁸, and afterwards in magisterial custody¹¹⁹, for the purpose of facilitating investigation. "Post-arraignment" detention for interrogation of a person *accused* of an offence is therefore statutorily authorised under the Indian Law.

We have already noted on an earlier occasion, the reprehensible nature of interrogation when it is conducted after a person has been *accused* of an offence. When a person is arrested and brought before a magistrate it means that the investigating officers, have already taken a decision to apply the criminal process against that person. What justification is there to subject a person to interrogation, after that point of decision? If there are gaps in the evidence requirements for prosecution, should the investigating officials be allowed to bridge them by extracting the "relevant information", from the accused himself? The least that can be said about the legal provision which authorises detention in police custody for the purpose of interrogation after a formal accusation, is that it runs counter to the presumption of innocence and the privilege against self-incrimination, which supposedly protect the accused under our system of criminal procedure.

The scattered pieces of evidence contained in the case reports reveal that the long period of time that the police get to interrogate the accused after his initial production before the magistrate *does* enable them to coerce the prisoners who are often illiterate and totally ignorant of their rights, to make confessional statements before the magistrate. Though circulars issued by the High Courts and the State Governments provide that the confession should be recorded in open Court during Court hours, it is not uncommon for the police to produce the accused before the magistrate during out-of-court hours. There are instances in which the accused are taken directly from the police station to the residence of magistrate at odd hours of the night and magistrates on their part have recorded the confessions without the least hesitation¹²⁰.

It is doubtful whether counsel's brief interview with the accused in custody can effectively prevent the making of these coerced confessions when we take into consideration the duration of time at the disposal of the investigating officials to interrogate the accused to get the "desired results". In any case it is beyond dispute, that counsel's presence in the scene for a few minutes cannot eliminate the evils inherent in the interrogative process. Besides, how many of the persons who are thus detained, know about their right to counsel? And how many could afford to get the service of a lawyer at this stage, even if it is assumed that some among them are aware of their right?

118. Section 167 of the Code of Criminal Procedure of India.

119. Section 344 of the Code of Criminal Procedure of India.

120. For instance in *R. v. Garib Hari*, 30 C.W.N. 454 (1926) where the confession was recorded at mid-night at the residence of the Hon. Magistrate, the Appellate Court rejecting the confession observed :

"No explanation appears to have been given as to why instead of waiting till next day and producing the accused before Magistrate, the accused was produced before the Hon. Magistrate that very night at his residence and confession was recorded there..... Under these circumstances it is necessary to scrutinise the evidence of the Magistrate with great degree of care in order to find out what he actually did and whether he did really comply with those formalities which have been from time to time laid down for the guidance of Magistrates in the matter of recording confession."

See also *R. v. Pramada Natha Bachi*, 21 Cr.L.J. 266 (1919).

Had these unwarranted and mischievous use of power by the police been a thing of the past, it would have been a matter for consolation and relief; but appellate records tell a different story. They reveal that even a decade after the attainment of independence, the police have not abandoned their old methods of making short-cuts in the matter of investigation of cases. In a recent case *Ramachandra v. State*, A.I.R. (1957 (S.C.) 381) which went up to the Supreme Court, the accused after a period of 3 months in custody during which time he was put quite often in solitary confinement and was interrogated by the police several times and also after several unsuccessful attempts to persuade him to make a confession, "volunteered" to make a statement, whereupon the District Magistrate deputed a young lady magistrate to the prison to record the same. It was found that the magistrate "did not ask him why he was making a confession after such a long time nor did she find out for how long he had been in custody, what was the treatment meted out when he was in police custody and whom he had interviewed in jail". And yet the trial Court and the State High Court thought not only that "the confession was voluntarily made; but it was also properly recorded."

Under Indian law, pre-trial confessions to be admissible in evidence should ordinarily be recorded by a magistrate who has a positive duty to administer caution to the prisoner, brought before him from police custody, before recording the confession¹²¹. The defendant is thus precluded from raising the contention during trial or appeal that he was not aware of his right to keep silent. But the statute does not provide that the magistrate should inquire whether the accused needs counsel nor is it necessary that he should inform the accused of his right to be represented by retained counsel. Even if the accused or his relations have engaged a lawyer, there is no obligation on the part of the magistrate to require his presence before or during the recording of confession. The "recurring phenomena of retraction of confessions"¹²² would continue to be the dominant feature of the criminal trial in Indian Courts, so long as benefit of counsel is not provided at this crucial point.

3. *Enforcement of the Right : Recommendations :*

The basic question that confronts us in this context is: whether there should be a non-judicial screening process to precede the judicial one, conducted by the primary agencies of law enforcement, in order to make a determination whether or not the criminal process should be applied against the person whom they have taken into custody? If the answer to the above question is in the affirmative, then, there is no reason for barring counsel's participation at this initial point of decision.

But due to the peculiar features of this phase of the process which we have outlined at the outset, there are many difficulties for giving effect to the right. In the open Court room presided over by a Judge and dominated by an insistence of procedural regularity, the exercise of any right provided by law may not create much difficulty; at least it may reasonably be expected that the rights provided by law would be protected. It is otherwise during the secret proceedings inside a police station. Even if statutory provision is made recognising right to counsel, and compelling the police officers to advise the suspect or accused of his right to counsel, there is no guarantee that these procedural requirements would be adhered to by them. Most people who are taken into custody are ignorant of their rights and the preceding survey shows that even when they indicate a desire to call a lawyer or to confer with retained counsel before or during interrogation, the officers can bar access to counsel until the process is over. Under such circumstances what relief could be provided to the accused in case of denial of the right?

121. Sections 164 and 364 of the Code of Criminal Procedure of India.

After giving the warning to the accused, it is essential that the Magistrate should put questions to satisfy himself that the confession was in fact voluntary. Also the questions with their answers must be recorded, so that the Courts before which the confession is used can be satisfied as to the voluntariness of it. No form of questions has been prescribed and of course it is not fruitful to attempt to lay them down specifically. But the way in which these questions are put to the accused by magistrates, in actual practice, could be seen from a recent case *Bhagan v. State*, 1955 A.I.R. Pepsu. 33, where the confessing accused was a young woman who was illiterate. Her confession was recorded beyond Court hours and in the house of the magistrate. The woman had been offered inducement by the village people. Relying on the confession she was convicted by the trial Court. Holding the confessional statement to be inadmissible in evidence, the State High Court observed :

"(We are) not convinced that this illiterate woman could have clearly understood the nature of the word alleged to have been used by the magistrate in warning her. At any rate the parrot-like use of the form in such cases could have no effect on the mind of the prisoner of such limited intelligence. If the police resorted to obtain a confession, as it did in this case, it is almost certain that they would tell the confessing accused the nature of the questions to be put by the magistrate and would make her believe that actually they meant nothing. The magistrate did not tell her that she was not to be returned to police custody after recording of her confession. In fact he returned her to the police custody and gave no order in writing that she was to be sent to the jail lock-up."

122. An English Judge once commented :

"During the 14 years of my practice in the Courts of England I do not remember half a dozen cases in which a real confession, once having been made, retracted. But in this country, on the contrary, the retraction follows almost invariably as a matter of course and though I am well aware how this is sought to be explained by a suggestion of the influence brought to bear upon the officer by other prisoners, the fact remains as an endless source of anxiety and difficulty to those who have to see that justice is properly administered." Justice Orfield in *R. v. Babu Lal*, 1 L.R. 6 All. 509.

One possible way to enforce the right is to make punishable any attempt on the part of the interrogating officers to contravene the provisions of the statute, which recognise right to counsel. The Californian statute has attempted to solve the problem in this manner.¹²³ But the experience shows that just as making it a crime to use third degree methods on the accused, has failed to prevent the same the Californian approach has failed to guarantee the defendant right to retain¹²⁴, counsel the time of arrest to the preliminary hearing.

Another suggested remedy to strictly enforce the right is to render inadmissible incriminating statements obtained from the accused, if he has been refused opportunity to obtain, and consult with, counsel. Hitherto in no case in the United States or in India,¹²⁵ has the failure to allow counsel been a decisive factor in holding a confession inadmissible. But the strong dissenting notes of the minority Judges in the United States Supreme Court in confession cases, the views expressed in the concurring opinions in *Spano v. New York*¹²⁶, and the interpretation given by the Court of Appeals to the *Crooker* decision in *Griffith v. Rhy*,¹²⁷—all these tend to show a growing favourable attitude in the United States towards the invalidation of confessions obtained in the absence of counsel.

But the exclusionary rule has not proved to be the best stimulus for obtaining from the police the desired response to lawful practices.¹²⁸ Invalidation of confessions obtained in the absence of counsel may not yield the expected result of enforcement of the right to counsel, because extorting a confession need not be the sole purpose of questioning¹²⁹. Herein lies the disadvantage of linking the counsel question with the validity of confessions.

Counsel may also encounter difficulties to participate 'effectively' in this essentially non-judicial process. For instance, what is the criterion to determine whether the prisoner had "adequate" representation at this stage? Would the requirement of right to counsel be satisfied by permitting the lawyer to confer with the prisoner before interrogation begins to advise him of his rights, or should the lawyer be allowed to remain throughout the time of questioning? In the latter case, if counsel has objection to the manner of questioning or the tactics employed, who is to resolve such matters in the unsupervised proceeding conducted by the investigating officers?

All these problems lead us to the inevitable question, whether this non-judicial screening process should be retained or not. Years before the Wickersham commis-

123. See note 59 ante.

124. *Right to Counsel Prior to Trial*, Note 44 Ky.L.J. 103.

125. See note 114 ante.

126. 360 U.S. 315 (1960).

127. 282 F. 2d 711 (9th Cir. 1960) Cert. denied, 5 L.Ed. 2d 273 (1961).

128. It has been pointed out that the police are generally insensitive to a Court's rejection of evidence merely because of the impropriety of the methods used in obtaining it and hence it is futile to improve police practices by rejecting improperly obtained evidence of guilt. See, Inbau, *Restrictions in the Law of Confessions*, 52 N.W. U.L. Rev. 77. But Prof. Allen seriously disputes this view. (*Due Process and State Criminal Procedures* 48 N.U.L. Rev. 16). Prof. Inbau also argues that the judiciary has no privileges to exert disciplinary control and supervision over the police. "The concept of three-fold division of powers seems to indicate (so).... Nevertheless, some Judges conceive their role to be that of part-time commissioners of police, an obviously non-judicial function."

129. Even if a confessional statement obtained as a result of the interrogation is rejected by the Court at the time of trial, the investigating officer could still procure leads to other admissible evidence by means of questioning.

In the United States, the State Courts have almost universally accepted the proposition that, although a coerced confession may not be admitted at the trial, physical evidence discovered in consequence of the confession is not to be excluded, if otherwise admissible. Such a result, of course, is in full accord with the 'trustworthiness rationale' of the confession rule. (Wigmore, *Evidence*, 809 (3rd ed. 1930) But the question arises whether such a ruling would survive the standards of the Due Process applied by the Courts in confession cases. There is ground to believe that such evidence may be rejected by the Court as the "fruits of the poisonous tree"

For Indian Law see section 27 of the Evidence Act.

sion in the United States suggested that a more "positive" judicially conducted screening could dispense with the 'necessity' of the present police interrogation. "The best remedy", according to the Commission¹³⁰, "would be the enforcement of the rule that every person arrested, charged with crime should forthwith be taken before a magistrate advised of the charge against them and then interrogated by the magistrate. His answers should be recorded and should be admissible in evidence against him in all subsequent proceedings. If he chooses not to answer it should be made permissible for counsel for prosecution, and for the defence, as well as for the trial Judge to comment on his refusal; but he should be informed also that he is not required to answer".

The above recommendation was criticised, (and later on rejected by the framers of the Federal Rules of Criminal Procedure in the United States) mainly on the ground that it would offend the constitutional privilege against self-incrimination. It seems that under the circumstances, the only possible and practical remedy lies in a combination of the above suggestion with the Indian procedural and evidentiary provisions governing the production of arrested persons before the magistrate and the admissibility of pre-trial confessions. An arrested person should be brought before a magistrate with the least delay and in any case within twenty-four hours after his arrest. He should be provided with counsel with whom he should be allowed to consult in private. After such consultation, with full knowledge about his rights, if he volunteers to make a statement the magistrate should record the same. The "voluntariness" of the confession so recorded should not be permitted, ordinarily to be questioned at the time of trial. And finally an accused should not be remanded to 'police custody', after his initial appearance before magistrate.

130. Report of the National Commission of Law Enforcement and Observance, Report No. 3, Also see, Roscoe Pound, 24 *Crim.L. Crim. & Pol.* 1016, 1017, Mc Cormick, *Evidence* 250-251. *Judicial Examination of the Accused—A Remedy to Third Degree* 30, *Mich.L. Rev.* 1224; *Pre-arrestment Interrogation*, Note 68 *Y.L.J.* 1003, 1031-7 (1959).

MARCH OF INTERNATIONAL LAW—A RETROGRADE STEP.

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The British Government's decision to extradite Chief Enahoro reminds one of what Maine observed in Ancient Law, "With respect to them (progressive societies) it may be laid down that social necessities and social opinion are always more or less in advance of law"¹.

On 13th December, 1962, Enahoro was arrested in Britain and committed to prison under section 5 of the Fugitive Offenders Act, 1881. The Nigerian Government had charged him of having committed treason and conspiracy to effect an unlawful purpose. The main point at issue was the surrender of a fugitive for a political offence.

It is interesting to note that extradition got its roots in international law mainly for the purpose of deporting persons accused of political crimes, but we find to-day that they are exempt from extradition. It is now a recognised principle of international law of extradition that political criminals should not be extradited. It is almost universal practice as manifested in treaties and national legislations in various countries, for the States to decline to extradite persons to be tried for political offences. The *raison d'être* behind this changed attitude seems to be that the basic principles of a moral order are not offended by political crimes because the political offender is regarded as having been actuated, not by the immoral tendencies but by the principles of justice.

It is an anomaly of the law in Britain that while the Government can grant political asylum to an alien², it cannot extend it to a citizen of the Queen's Dominions. Under the Fugitive Offenders Act, 1881, a person accused of a crime in one of the dominions can be arrested in any other and returned for trial³. The principle of the non-extradition of political offenders has no application there. Section 9 of this Act⁴, specifically mentions "treason", which is admittedly a political offence⁵, as one of the crimes for which surrender may be granted. Chief Enahoro had, therefore, no legal case for challenging the British Governments' decision to return him. Naturally, the House of Lords, Appeals Committee refused his plea, and his last attempt in the Court of Appeal for an order of discharge pursuant to section 7 of the Fugitive Offenders Act, 1881, and for a writ of *habeas corpus* also remained unsuccessful⁶.

1. Page 20.

2. Section 3 (i) of the Extradition Act, 1870 states; "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character."

3. Section 2 of the Fugitive Offenders Act, 1881 runs as follows:

"Where a person accused of having committed an offence (to which this part of the Act applies) in one part of Her Majesty's dominions has left that part, such person if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive."

4. Section 9 states; "This part of this Act shall apply to the following offences, namely, to treason."

5. See author's article, "The Extradition Bill, 1961 A critical Study", (1962) 1 S.C.J. 57.

6. *R. v. Brixton Prison (Governor) and another, Ex parte, Enahoro* (1963) 2 All E.R. 477.

When the supporters of Enahoro found that the blind goddess of law would not budge an inch, they tabled censure motions in the House of Commons and a vast amount of public debate took place. For it must be remembered that "fugitives" who have been committed under the Fugitive Offenders Act, 1881, need only be returned to the demanding country if the Home Secretary 'thinks it just'.⁷ In a very recent case,⁸ where two persons were awaiting their return to Cyprus, and their applications for writs of *habeas corpus* and for relief under section 10 of the Fugitive Offenders Act, 1881, were rejected by the House of Lords, the Home secretary intervened and gave executive relief to the two men under section 6 of the Fugitive Offenders Act, 1881. But history did not repeat itself, and in the present case, Chief Enahoro was sent back to Nigeria.

The point for consideration is whether the Fugitive Offenders Act, 1881, laying down a special procedure for intra-Commonwealth extradition and denying the generally accepted principle of international law that a person may not be extradited for a political offence is not already an outdated and outmoded statute. It must be remembered that "The Fugitive Offenders Act was passed when the supreme legislative powers of the Empire rested in the Parliament of the United Kingdom and the Judicial Committee of the Privy Council was the highest Court of appeal. However, at present a goodly portion of the Commonwealth members no longer allow appeals to the Judicial Committee of the Privy Council. The Act offered an easy administrative expedient for the return of fugitives from one part of the Empire to another without their ever leaving the jurisdiction of the highest Court of Appeal".⁹ But to-day the position is changed. Many countries have withdrawn from the Commonwealth. India, a member of the Commonwealth, has specifically enacted that a fugitive criminal shall not be surrendered or returned to a foreign State or commonwealth country if the offence in respect of which his surrender is sought is of a political character.¹⁰ The view expressed by the delegation of Ceylon (a member of the Commonwealth) at the Third Session of the Asian African Legal Consultative Committee, 1960 (Colombo) was that "this principle (that extradition shall not be granted for political offences) has been accepted in Ceylon at present"¹¹. Thus the actual area of the application of the Fugitive Offenders Act, specifically in so far as it does not accept the principle of non-extradition of political offenders has been narrowed down, and "whatever was the original *raison d'être* for the non-exclusion of political offences, be it unity of sovereignty or common political ideals, the Fugitive Offenders Act is not likely to secure the surrender of political offenders"¹².

A ray of hope was raised that the procedure under Fugitive Offenders Act, 1881 may be put on par with that of the Extradition Act, 1870, when Lord Goddard, G.J., observed, "I am quite sure that in a proper case the Court would apply the same rule with regard to applicants under the Fugitive Offenders Act, 1881, as it does under section 3 (1) of the Extradition Act, 1870. If it appeared that the offence with which the prisoner was charged was in effect a political offence, no doubt this Court would refuse to return him"¹³. But this dictum has been firmly disapproved by the House of Lords in *Zacharia v. Republic of Cyprus and another*¹⁴, where Viscount Simonds observed, "But the Fugitive Offenders Act, 1881, unlike the Extradition Act, 1870 makes no exception of political offences. I am therefore of opinion that it is irrelevant to consider whether the offences with which Zacharia

7. Section 6 of the Fugitive Offenders Act, 1881.

8. *Zacharia v. Republic of Cyprus and another*, (1962) 2 All E.R. 438.

9. Robert E. Clute "Law and Practice in Commonwealth Extradition", (1959) 8 A.J. Comp. 15 at 2.

10. The Extradition Act, 1962, section 31 (a).

11. Report of the Third Session of the Asian African Legal Consultative Committee, p. 193.

12. Paul O' Higgins "Extradition within the Commonwealth", 9 I.C. L.Q. 495.

13. *Re Government of India and Mubark Ali Ahmed*, (1952) 1 All E.R. 1060 at 1963.

14. (1962) 2 All E.R. 438.

has been charged could in another context he called "political offences", and I must respectfully dissent from a dictum of Lord Goddard, C.J., in *Re Government of India and Mubarak Ali Ahmed*^{14-a}, where a similar question arose¹⁵.

Thus at present the situation is that unless the Executive intervenes in the proceedings under section 6 of the Fugitive Offenders Act, 1881, the political offenders may be extradited under the Act. And it must be confessed that in such situations the position of the Home Secretary is unenviable. On the one hand if he considers that the return of the offender would not be just (under section 6 of the Fugitive Offenders Act), on the face of it, he is disregarding the decision of the House of Lords, for he is not bound by the way their Lordships' discretion has been exercised, and at the same time his decision may be offensive to a friendly member of the Commonwealth, the requesting State. On the other hand, if he decides to deport the political offender, as was done in the present case, he cannot take a quasi-judicial decision without raising a political storm. The endorsement of the government's decision by the highest Court of the land does not extricate the Government from an embarrassing situation. The happenings in the present case have clearly proved this. While Enahoro was arrested in December, 1962, the British Government had stayed deportation while it considered the question of whether he would be liable to be sentenced to death in Nigeria. The Prime Minister's statement in Parliament that the charge cannot bear a death sentence was only half the answer. He was silent about whether the Government would grant asylum if there was the risk of a death sentence. The Government's qualms of conscience strengthened its critics in pointing out that it can still take a political decision about granting asylum to Enahoro after the judicial processes are over.

The conclusion may be derived that the Fugitive Offenders Act, 1881 is now in need of revision. It seems to call for a review. The powers of the Courts under that Act were suitable to a time when the British Empire did not include independent States and Democratic Republics as members of the Commonwealth. Naturally, if the offence alleged against an offender was a political one, it was not in itself a sufficient ground for refusing to return him. But "In the light of the changed circumstances and, in particular, in view of the fact that there are considerable differences between the political institutions adopted in different parts of the Commonwealth, it may therefore well be time to review the position of political offenders in intra-Commonwealth extradition"¹⁶.

It is gratifying to know that there is already a move for the revision of intra-Commonwealth extradition practice. But one must agree with Mr. C. Thornberry that "the Enahoro case has been an object lesson in the folly of excluding the 'offence of a political character' clause from any arrangement between independent States, however close their ties, for the extradition of fugitive offenders; and it may be hoped that such a retrograde step will not be taken when the proposed revision occurs."¹⁷.

[END OF VOLUME (1964) 1 S. C. J. (JOURNAL).]

14-a. (1952) 1 All E.R. 1060 at 1963.

15. Ibid p. 444.

16. Paulo's Higgs' *Extradition Within the Commonwealth*, 9 I.C.L.Q. 486 at 491.

17. (1963) 26 Mod. L.R. 855 at 860.

[SUPREME COURT.]

K. Subba Rao, *Raghubar Dayal* and
J. R. Mudholkar, JJ.
4th April, 1963.

Raja Ram Jaiswal v.
The State of Bihar.
Cr.A. No. 125 of 1961.

Evidence Act (I of 1872), section 25—Criminal Procedure Code (V of 1898), sections 156, 162 and 190—Confession to Excise Sub-Inspector in the course of investigation is inadmissible.

By majority (*Raghubar Dayal*, J. holding contra).—Confession made to an Excise Sub-Inspector must be excluded. For it is a statement made during the course of investigation to a person who exercises the powers of an officer in charge of a police station. Such statement is excluded from evidence by section 162 of the Code of Criminal Procedure except for the purpose of contradiction (*vide Evidence Act, section 25 and Criminal Procedure Code, section 162*).

A. S. R. Chari, Senior Advocate (*M. K. Ramamurthi, R. K. Garg, S. C. Agarwala* and *D. P. Singh*, Advocates of *M/s. Ramamurthi & Co.*, with him), for Appellant.

D. Goburdhan, Advocate, for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT.]

P.B. Gajendragadkar, K. Subba Rao,
K.N. Wanchoo,
N. Rajagopala Ayyangar and
J.R. Mudholkar, JJ.
31st October, 1963.

Bhogaraju Venkata Janaki Rama
Rao v. The Board of Commrs.
for H.R.E., A.P., Hyderabad.
C. As. Nos. 531-532 of 1961.

Madras Hindu Religious Endowments Act (Madras Act II of 1927), section 57 (9)—Order cancelling or modifying scheme under section 92, Civil Procedure Code—If ‘decree’—If appeal lies under section 96, Civil Procedure Code.

A scheme which is framed under section 92, Civil Procedure Code which is “deemed to be a scheme under section 75 of the Madras Hindu Religious Endowments Act”, is one which has been framed in a suit and the scheme itself is part of the decree in the scheme-suit. It is for the modification or cancellation of such a scheme or rather of the scheme which is part of the decree that section 57 (9) of the Act makes provision by the machinery of an application. If, after hearing the application under section 57 (9), the scheme itself is cancelled, and section 57 (9) provides for such a contingency and contemplates such an order the previous decree will cease to exist. In such an event it would scarcely be open to argument that the vacating of the decree passed under section 92 of the Civil Procedure Code would not itself amount to a decree within the meaning of section 2 (2) of the Civil Procedure Code. It makes no difference in that instead of the decree being vacated by cancellation, it is modified.

Where the office being hereditary could not be abolished, it is not proper to direct the virtual abolition of this office depriving the office-holder of his customary remuneration merely because some portion of the responsibilities for keeping proper accounts of *dibbi* collections was entrusted to an Executive Officer.

T. Satyanarayana, Advocate, for Appellant (In C.A. No. 531 of 1961) and Respondents Nos. 3, 4, 6, 7 and 10 to 12 (In C.A. No. 532 of 1961).

A.F. Viswanatha Sastri, Senior Advocate, (*T.V.R. Tatachari*, Advocate, with him), for Appellants (In C.A. No. 532 of 1961).

C.K. Daphtary, Attorney-General for India, (*R. Ganapathy Iyer* and *R.N. Sachthy*, Advocates, with him), for Respondent (In C.A. No. 531 of 1961) and Respondent No. 2 (In C.A. No. 532 of 1961).

G.R.

Appeals allowed.

[SUPREME COURT.]

P. B. Gajendragadkar, K. Subba Rao,
K. N. Wanchoo, J. C. Shah, and
Raghubar Dayal, JJ.
19th November, 1963.

R. P. Kapur v.
Union of India.
C.A. No. 647 of 1963.

Civil Services (Classification, Control and Appeal) Rules—Indian Independence Act—All India Services Act (LXI of 1951)—Indian Administrative Services Recruitment Rules, 1954—All India Services (Discipline and Appeal) Rule, 1955—Article 314 of the Constitution—Section 247 (3) of the Government of India Act, 1935—General Clauses Act (X of 1897)

By Majority.—The proper procedure in a case where the State Government wants a member of the former Secretary of State's Services to be suspended pending departmental enquiry or pending investigation, inquiry or trial of a criminal charge against him is to approach the Government of India and ask it as the appointing authority to suspend such officer as an interim measure. It is not open to the Government of India by framing a rule like rule 7 of the All India (Services Discipline and Appeal) Rules (1955) to take away the guarantee as to disciplinary matters contained in Article 314 of the Constitution. The guarantee in the case of a member of the former Secretary of State's Services is that in disciplinary matters his rights would be the same or as similar thereto as changed circumstances would permit as they were immediately before the commencement of the Constitution. The right in the matter of interim suspension as distinct from suspension as a punishment was that a member of the former Secretary of State's Services could not be suspended by any authority other than the Government of India. That was guaranteed by Article 314 and could not be taken away by framing a rule like rule 7 of the Discipline Rules. Rights guaranteed by Article 314 of the Constitution could not be destroyed or taken away by the Central Government in exercise of its rule-making power. (*See* (1962) Suppl. 1 S.C.R. 505). In the present case the right guaranteed to a member of the former Secretary of State's Services with respect to interim suspension (as distinct from suspension as a punishment) is that such a member cannot be so suspended except by the appointing authority which in the changed circumstances is the Government of India. That right has been violated by rule 7 of the Discipline Rules in so far as it permits any authority other than the Government of India to suspend pending a departmental enquiry or pending a criminal charge, a public servant who was a member of the former Secretary of State's Services. Rule 7 is to that extent *ultra vires* Article 314, i.e., in so far as it applies to the members of the Indian Administrative Service who fall within clauses (a) and (b) of rule 3 of the Recruitment Rules. It follows therefore that the order of the Governor dated 18th July, 1959, purporting to be passed under rule 7 (3) of the Discipline Rules is without authority and must be set aside.

Appellant in person.

S.V. Gupta, Additional Solicitor-General of India and N.S. Bindra, Senior Advocate, (R.H. Dhebar, Advocate, with them), for Respondent No. 1.

S.M. Sikri, Advocate-General for the State of Punjab and N.S. Bindra, Senior Advocate, with them), for Respondent No. 2.

G.R.

Appeal allowed.

[SUPREME COURT.]

A.K. Sarkar, M. Hidayatullah and
J.C. Shah, JJ.
19th November, 1963.

Jivarajbhai Ujamshi Sheth v.
Chintamanrao Balaji.
C.A. No. 717 of 1963.

Arbitration Act (X of 1940), sections 14 (2), 16 and 19—Determination of the share of the retiring partner.

Where the arbitrator has included in his valuation some amount which he was incompetent, by virtue of the limits placed upon his authority by the deed of reference

to include, it is a case of assumption of jurisdiction not possessed by him, and that renders the award, to the extent to which it is beyond the arbitrator's jurisdiction, invalid. It is however, impossible to sever from the valuation made by the arbitrator the value of the depreciation and appreciation included by the arbitrator. The award must, therefore fail in its entirety.

S.T. Desai, Senior Advocate, (*I.N. Shroff*, Advocate, with him), for Appellants.

G.S. Pathak, Senior Advocate, (*Rameshwar Nath*, Advocate of *M/s. Rajinder Narain & Co.*, with him), for Respondent Nos. 1 to 3.

A.V. Viswanatha Sastri, Senior Advocate, (*Rameshwar Nath*, Advocate of *M/s. Rajinder Narain & Co.*, with him), for Respondents Nos. 4 and 5.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, *A.K. Sarkar*,
K. N. Wanchoo, *K. C. Das Gupta*
and *N. Rajagopala Ayyangar*, JJ.
25th November, 1963.

State of Orissa v.
Ram Chandra Dev.

C. As. Nos. 293-294 of 1949.

Madras Regulation XXV of 1802—Madras Estates Abolition and Conversion into Ryotwari Act (XXV of 1948)—Section 80, Civil Procedure Code (V of 1908)—Articles 31 and 226 of the Constitution—High Court's Powers to issue a Writ of Mandamus.

Applying its earlier decision in *The State of Orissa v. Madan Gopal Rungta and others* connected appeals, (1951) S.C.J. 764 : (1951) 2 M.L.J. 645 : (1952) S.C.R. 28, the Court held:—"In our opinion, what the High Court has done in the present cases is substantially similar to what had been done in the case of *Madan Gopal Rungta*.

It appears that in issuing the writ in favour of the respondents, the High Court failed to appreciate the legal effect of its conclusion that questions of title cannot be tried in writ proceedings. Once it is held that the question of title cannot be determined, it follows that no right can be postulated in favour of the respondents on the basis of which a writ can be issued in their favour under Article 226.

We do not wish to examine the question which these decisions have considered, because, in our opinion, possession of the respondents cannot be said to constitute any right against the appellant, having regard to the fact that the properties in question originally belonged to the appellant and had been granted by the appellant to the predecessors of the respondents, unless the effect of the terms of the grants is duly determined. That being so, we must hold that the High Court was in error in issuing a writ against the appellant, and in favour of the respondents in the writ petitions from which the two appeals arose.

D.B. Sahu, Advocate-General for the State of Orissa and *C.B. Agarwala*, Senior Advocate (*R. Ganapathy Iyer* and *R.N. Sachthy*, Advocates, with them), for Appellant (In both the Appeal).

T.V.R. Tatachari, Advocate, for Respondents (In both the Appeals).

G.R.

Appeal allowed.

[SUPREME COURT.]

P.B. Gajendragadkar, *K.N. Wanchoo* and
K.C. Das Gupta, JJ.
25th November, 1963.

The Workmen of Dewan Tea Estate v.
Their Management.
C.A. No. 390 of 1963.

Industrial Disputes Act (XIV of 1947), section 25-G—Standing Orders—Lay-off period of 45 days—Compensation to workmen.

But the question which we have to decide is whether the financial position disclosed by the evidence on the record can be described as constituting a cause beyond the control of the respondents. We are not inclined to answer this question in

favour of the respondent. Besides having regard to the factors specified by the Rule 8 (1) (i) of the Standing Orders before the clause in regard in other causes beyond his control was introduced, it would not be easy to entertain the argument that a trading reason of the kind suggested for the Management can be included in that clause. Therefore, we are satisfied that the Tribunal was in error in holding that the impugned lay-off could be justified by Rule 8 (a) (i).

In the result, we reverse the finding of the Tribunal that the lay off declared by the respondent for 45 days in 1959 was justified. That being so, it is unnecessary to consider the individual cases of the nine respective companies, because whatever may have been their respective financial position, under the relevant Rule they could not validly declare a lay-off at all, nor could they have declared the lay-off in exercise of their alleged common law right. The questions referred to the Tribunal must, therefore, be answered in favour of the appellants. The appeal is accordingly allowed and the appellants' claim for full wages for the 45 days of lay-off in respect of the 11 tea gardens is awarded to them. The appellants will be entitled their costs through out.

C.B. Agarwal, Senior Advocate, (*J.N. Hazarika* and *K.P. Gupta*, Advocates, with him), for Appellants.

Sankar Bannerjee, Senior Advocate, (*P.K. Chatterjee*, *D.N. Gupta* and *B.N. Ghosh*, Advocates, with him), for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT.]

P.B. Gajendragadkar and *K.C. Das*

Gupta, JJ.

29th November, 1963.

Fakir Chand v.

Komal Pd.

Cr. A. No. 180 of 1962.

Criminal Procedure Code (V of 1898), section 439—Challenge against order of acquittal—When sustainable.

The power of the High Court to set aside an order of acquittal at the instance of a private party can be exercised only in exceptional cases as for e.g. where the trial Court has wrongly shut out the evidence which the prosecution wished to produce, or where the appellate Court has wrongly held evidence which was admitted by the trial Court to be inadmissible, or where material evidence has been overlooked either by the trial Court or by the appellate Court, or where the acquittal is based on a compounding of the offence which is invalid under the law. *Chinnaswamy Reddy v. State of Andhra Pradesh*, (1963) 3 S.C.R. 412 : A.I.R. 1962 S.C. 1788. It is only where the order of acquittal challenged before the High Court under section 439 of the Code of Criminal Procedure suffers from any such infirmity the High Court can set aside the order of acquittal. The High Court cannot on a reappraisal of evidence set aside the acquittal on the ground that the trial Court has not properly appreciated the evidence adduced by the prosecution.

Purshottam Trikandas, Senior Advocate, (*Ravindar Narain*, *O.C. Mathur* and *J.B. Dadachanji*, Advocates of *M/s. J.B. Dadachanji & Co.*, with him), for Appellants.

Miss Sushma Malik and *Ram Bheja Lal Malik*, Advocates, for Respondent No. 1.

I.N. Shroff, Advocate, for Respondent No. 2.

G.R.

Appeal allowed.

[SUPREME COURT.]

P.B. Gajendragadkar and *K.C. Das*

Gupta, JJ.

29th November, 1963.

Manipur Administration v.

M. Nila Chandra Singh.

Cr. App. 143 of 1962.

Manipur Foodgrain Dealers Licensing Order, 1958, Clause 3 (2)—Essential Commodities Act, 1955, section 7.

It appears that clause 3 (2) may have been deliberately worded so as to raise a limited presumption in order to exclude cases of cultivators who may on occasions

be in possession of more than 100 mds. of foodgrains grown in their fields. If a cultivator produces more than 100 mds. in his fields or otherwise comes into possession of such quantity of foodgrains once in a year and casually sells them or stores them, the Order apparently did not want to make such possession, sale or storage liable to be punished under clause 3 (1) read with section 7 of the Essential Commodities Act. However that may be, having regard to the words used in clause 3 (2), we are unable to hold that the Judicial Commissioner was wrong in coming to the conclusion that clause 3 (2) by itself would not sustain the prosecution case that the respondent is a dealer under clause 3 (1); and that inevitably means that the charge under section 7 of the Essential Commodities Act is not proved against him. That being so, we must hold that the order of acquittal passed by the Judicial Commissioner is right.

B. K. Khanna and R. N. Sachthey, Advocates, for Appellant.

Dr. W. S. Barlingay, Senior Advocate, (A.G. Ratnaparkhi, Advocate, with him), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar and K.C. Das

Gupta, JJ.

29th November, 1963.

Dr. Yash Pal Sahi v.

The Delhi Administration.

Cr. A. No. 157 of 1962.

Drugs and Magic Remedies (Objectionable Advertisement) Act (XXI of 1954)—
Offence under section 3 read with section 7.

The whole object of the Act is to save ignorant people from being duped to purchase medicines just because their effect is advertised in eloquent terms. That is why the Act provides that lists of medicines describing the qualities and attributes of different medicines should be sent only to registered medical practitioners or hospitals. That being so, it would not be a fair argument to urge that even though the appellant might have sent the list to a person who was not a registered medical practitioner, the recipient of the list should have been put on his guard and should not have looked into the list. We are, therefore, satisfied that the High Court was right in holding that the offence charged against the appellant has been duly proved. In regard to the sentence, the learned Additional Sessions Judge has reduced the sentence of Rs. 1,000 fine imposed on the appellant by the learned Trial Magistrate to Rs. 500 and that we think is a fair order to make.

J.P. Goyal, Advocate, for Appellant.

B.K. Khanna and R.N. Sachthey, Advocates, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar and K.C. Das

Gupta, JJ.

29th November, 1963.

Melcod & Co., Ltd. v.

The Workmen.

G.A. No. 514 of 1963.

Industrial Dispute—Payment of cash allowance in lieu of the tiffin arrangement—
Re-employment of retired persons.

The history of the relations between the parties coupled with the prevailing practice in the comparable concerns in the region strongly supports the view taken by the Tribunal that in the appellant's concern it was an implied condition of service that in addition to the wages and dearness allowance, a provision for tiffin was an amenity to which the employees were entitled. That being so, we do not think that the appellant's grievance against the direction in the award that As. 8 and As. 6 per day should be paid respectively to the members of the clerical staff and the sub-staff on all working days can be upheld.

If re-employments are made on the basis of reduced salary, that really means that the appellant is introducing a wage-structure in respect of the re-employed personnel which is definitely inferior to the wage-structure devised for the employees of the appellant by the award, and that clearly cannot be permitted under industrial law. Besides, if senior persons are re-employed after retirement, that is apt to retard or hamper the prospects of promotion to which the junior employees are entitled to look forward. It is in the light of these facts that the question posed by the respondents' demand must be considered. Thus considered, we see no justification for Mr. Sastri's grievance that the limited direction issued by the award is either improper or unjustified. The fact that the re-employed persons have made an affidavit supporting the practice adopted by the appellant can have no material bearing in dealing with the point; in the very nature of things, the said re-employed persons are bound to support the appellant.

A. V. Viswanatha Sastri, Senior Advocate, (*D. N. Gupta*, *S. C. Majumdar* and *B. N. Ghosh*, Advocates, with him), for Appellant.

D. L. Sen Gupta and *Janardan Sharma*, Advocates, for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, *K.N. Wanchoo* and

K.C. Das Gupta, JJ.

2nd December, 1963.

State Bank of India v.

Nanak Chand Jain.

C.A. No. 126 of 1963.

Industrial Disputes Act (XIV of 1947), section 33 (2)—Banking Companies—Sastri Award—Payment of three months' salary in lieu of notice.

The Sastri Award did not intend that the services of such an employee could be terminated by giving him three months' notice without paying him three months' pay and allowances. Though the words "in lieu of notice" have been used in para. 521 (2) of the Award it is clear that three months' pay and allowances have to be paid in every such case of termination of service. The object in making this provision appears to be to give the employee some monetary assistance. It is difficult to see why three months' pay and allowances paid under para. 521 (2) (c) should not be held to include pay for a lesser period as provided under the Proviso to section 33 (2) of the Industrial Disputes Act.

The payment for a longer period should be held to include payment for the shorter period and where three months' pay and allowances had been paid under the provisions of para. 521 (2) (c) no further payment of one month's wages under the Proviso to section 33 (2) is required.

C.K. Daphtary, Attorney-General for India, *H.N. Sanyal*, Solicitor-General of India and *S.V. Gupta*, Additional Solicitor-General of India, for Appellant.

Dr. Anand Prakash and *S.N. Bhandari*, Advocates, for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT.]

A.K. Sarkar, *J.C. Shah* and

Raghubar Dayal, JJ.

18th December, 1963.

Yedala Pentiaiah v.

Vadrevu Chelamayya.

C. As. Nos. 497 of 1961 & 263 of 1962.

Madras Estates Land Act (I of 1908)—Definition of 'Estate' in section 3 (2) (e).

The Totapalli Mansabdari was not held as an under-tenure of the Peddapuram Zamindari in 1908 when the Estates Land Act came into force and therefore Totapalli estate was not an estate within the meaning of the provisions of clause (e) of sub-section (2) of section 3 of the Act.

The Totapalli Mansabdari ceased to be a Jagir long before 1908.

A. V. Viswanatha Sastri, Senior Advocate, (*K. Jayaram* and *R. Ganapathy Iyer*, Advocates, with him), for Appellants (In both the appeals).

Mrs. Durgabai Deshmukh and T. Satyanarayana, Advocates, for Respondent
(In C.A. No. 497 of 1961).

A. Ranganadham Chetty, Senior Advocate, (A. V. Rangam, Miss. A. Vedavalli and P. Satyanarayana), Advocates, for Respondents 2 to 6 and 8 to 10 (In C. A. No. 263 of 1962).

G.R.

Appeals dismissed.

[SUPREME COURT.]

*P. B. Gajendragadkar,
K. N. Wanchoo and
K. C. Das Gupta, JJ.
19th December, 1963.*

*The State Bank of India v.
M. Selvaraj Daniel.
R.P. No. 33 of 1963.*

*Industrial Disputes Act (XIV of 1947), sections 33 (6) (2)—Banking Companies—
Sastry Award.*

We are, therefore still inclined to think that the appellant Daniel was appointed by the Bank on December 14, 1943, on the pay scale as fixed by the Sastry Tribunal. In any case, the Bank has not been able to satisfy as that any error was made in disposing of the appeal on the basis that Daniel's appointment was on the pay scale as fixed by the Sastry Award. This is sufficient to dispose of the review application.

C. K. Daphitray, Attorney-General for India and H. N. Sanyal, Solicitor-General of India, (H. L. Anand, B. C. Das Gupta and V. Sagar, Advocates of Anand Das Gupta and Sagar and K. Baldev Mehta, Advocate, with them), for Appellant.

M. K. Ramanurthi, R. K. Garg, S. C. Agarwal and D. P. Singh, Advocates of M/s. M. K. Ramanurthi & Co., for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*M. Hidayatullah and
Raghubar Dayal, JJ.
7th January, 1964.*

*Afrhim Sheikh v.
The State of West Bengal.
Cr.A. No. 134 of 1963.*

Penal Code (XLV of 1860), sections 34 and 304, Part II—Prior concert—Proof.

The essence of section 34 of the Penal Code is that common intention must exist before the criminal act is perpetrated. In the instant case the six accused could not but by a prior concert have appeared simultaneously at the scene, chased and overthrown the victim, held him down and beaten him. The facts disclosed in the evidence clearly establish a prior concert amongst the six accused. But as the death was not the result of the act of a single individual but was the result of the act of several persons, and they shared the common intention, namely, the commission of the act or acts by which death was occasioned, the second part of section 304 cannot be viewed divorced from common intention. The common intention which is requisite for the application of section 34 is the common intention of perpetrating a particular act. Even if the offence is only culpable homicide not amounting to murder, there is no doubt whatever that the offence is shared by all the six accused and section 34 then makes the responsibility several if there was a knowledge possessed by each of them that death was likely to be caused as a result of that beating.

D. N. Mukherjee, Advocate, for Appellants.

P. K. Chakravarti and P. K. Bose, Advocates, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

B. P. Sinha, C.J.,
K. Subba Rao, Raghubar Dayal,
N. Rajagopala Ayyangar and
J.R. Mudholkar, J.J.
13th January, 1964.

Ch. Subharao v.
The Member, Election Tribunal,
Hyderabad and others.
C.A.No. 971 of 1963.

Representation of the People Act (XLIII of 1951), sections 81, 85, 86, 90 and 117—Scope.

While we are conscious of the need for expeditious disposal of election petitions, and for the strict enforcement of provisions designed to achieve this purpose we cannot be oblivious to the circumstance that to read every requirement literally might equally defeat the purpose for which Part VI is intended, viz., that elections are conducted in accordance with the relevant statutory provisions framed to ensure purity and orderliness and that the candidate who has not obtained a majority of valid votes or has obtained it in flagrant breach of the statutory provisions is not held entitled to represent the constituency.

We do not, however, consider that there is really need for so much refinement when one has to look at whether there is a substantial compliance with the requirement of this provision. There is no compelling necessity to hold that the signatures were merely intended to be a copy of those on the original in order to spell out a non-compliance with section 81 (3), seeing that a signature in original was not needed on the copy and a writing copying out the name of the signatory would suffice. The decision of this Court in *Murarka v. Roop Singh*, (G.As. Nos. 30 and 31 of 1963 (not yet reported) decided on 7th May, 1963), is authority for the position that the absence of a writing in the copy indicating the signature in the original would not detract the copy from being a true copy. In the circumstances, we consider that there has been substantial compliance with the requirement of section 81 (3) in the petition that was filed by the appellant and the learned Judges were in error in directing the dismissal of the petition.

P.A. Chaudhry and T.V.R. Tatachari, Advocates, for Appellant.

H.N. Sanyal, Solicitor-General of India, (P. Ram Reddy, Advocate, with him), for Respondent No. 3.

G.R.

Appeal allowed.

[SUPREME COURT.]

B.P. Sinha, C.J., K. Subba Rao, Raghubar
Dayal, N. Rajagopala Ayyangar and
J.R. Mudholkar, J.J.
14th January, 1964.

In re, Lily Isabel Thomas.

Petition No. 42 of 1963.

Supreme Court Rules—Rules 16 and 17—Article 145 (1) (a) of the Constitution—Section 214 of the Government of India Act—Advocates Act, sections 52 and 58—(Meaning of “right to practice”).

We do not agree that the words “persons practising before the Court” is narrower than the words “persons entitled to practise before the Court”. The learned Additional Solicitor-General was well-founded in his submission that if, for instance, there was no law made by Parliament entitling any person to practise before this Court, the construction suggested by the appellant would mean that this Court could not make a rule prescribing qualifications for persons to practise in this Court. In this connection it is interesting to notice that the words used in Article 145 (1) (a) have been taken substantially from section 214 (1) of the Government of India Act, 1935.

We ought to add that there is no anomaly involved in the construction that this Court can by its rules make provisions prescribing qualifications entitling persons to practise before it, and that Parliament can do likewise. There is no question

of a conflict between the legislative power of Parliament and the rule-making power of this Court, because by reason of the opening words of Article 145 any rule made by this Court would have operation only subject to laws made by Parliament on the subject of the entitlement to practice. We are, therefore, clearly of the opinion that on the express terms of Article 145 (1) (a) the impugned rules 15 and 17 are valid and within the rule-making power.

Petitioner in person.

S.V. Gupte, Additional Solicitor-General of India and *N. S. Bindra*, Senior Advocate, (*R. H. Dhebar*, Advocate, with them), for the Hon'ble Judges of the Supreme Court.

A. Ranganadham Chetty, Senior Advocate, (*Miss. A. Vedavalli* and *A.V. Rangam*, Advocates, with him), for Intervener (*W.G. Chopra*, Advocate).

G.R.

Petition rejected.

[SUPREME COURT.]

K. Subba Rao and *J.R. Mudholkar*, JJ.

Pentapati China Venkanna v.

Pentapati Bangararaju.

20th January, 1964.

G.A. No. 690 of 1962.

Civil Procedure Code (V of 1908), Order 21, Rules 11 to 14, 17 (1) 23 and 57 and section 48.

An application for execution made after 12 years from the date of the decree would be a fresh application within the meaning of section 48 of Code of Civil Procedure, if the previous application was finally disposed of. It would also be a fresh application if it asked for a relief against parties or properties different from those proceeded against in the previous execution petition or asked for a relief substantially different from that asked for in the earlier petition.

Where the parties are substantially the same in both the proceedings, and the decree-holders are only proceeding against properties included in the previous application the application cannot be treated as a fresh application within the meaning of section 48 of the Code. It is only an application to continue the earlier execution petition which is pending on the file of the executing Court.

S. Suryaprakasam and *Sardar Bahadur*, Advocates, for Appellant.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. Subba Rao, and

J.R. Mudholkar, JJ.

21st January, 1964.

Somchand Sanghvi v.

Bibhuti Bhusan Chakravarty.

Cr.A. No. 90 of 1961.

Criminal Procedure Code (V of 1898), section 197—Scope.

It is true that for considering whether section 197, Criminal Procedure Code, would apply the Court must confine itself to the allegations made in the complaint. But that does not mean that it need not look beyond the form in which the allegations have been made and is incompetent to ascertain for itself their substance.

It cannot be disputed that whether a person charged with an offence should or should not be released on bail was a matter within the discretion of the respondent Magistrate and if while exercising a discretion he acted illegally by saying that bail would not be granted unless the appellant did something which the appellant was not bound to do, (for instance settle the matter with the complainant), the respondent cannot be said to have acted otherwise than in his capacity as a public servant. For this reason the sanction of the appropriate authority for the respondent's prosecution was necessary under section 197, Criminal Procedure Code.

Sulmar Ghose, Advocate, for Appellant.

D.V. Mukherjee, Advocate, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*P.B. Gajendragadkar, K.N. Wanchoo,
K.C. Das Gupta, J.C. Shah, and
N. Rajagopala Ayyangar, JJ.*
21st January, 1964.

*G.S. Ramaswamy and others v.
The Inspector General of Police.*
(in C.A. Nos. 972-977 of 1963
and P. Nos. 64, 90-94 & 173-174 of 1963.

Hyderabad District Police Act (X of 1929 Fasli), section 6—Hyderabad District Police Manual, Rule 399—States Reorganisation Act of 1956.

A probationer cannot after the expiry of the probationary period automatically acquire the status of a permanent member of a service, unless of course the rules under which he is appointed expressly provide for such a result. (A.I.R. 1962 S.C. 1711). Therefore even though a probationer may have continued to act in the post to which he is appointed on probation for more than the initial period of probation, he cannot become a permanent servant merely because of efflux of time, unless the Rules of service which govern him specifically lay down that the probationer will be automatically confirmed after the initial period of probation is over. Though Rule 486, Hyderabad District Police Manual says that "promoted officers will be confirmed at the end of their probationary period", it is qualified by the words "if they have given satisfaction". Clearly therefore the rule does not contemplate automatic confirmation after the probationary period of two years, for a promoted officer can only be confirmed under this rule if he has given satisfaction. The authority competent to confirm him must pass an order to the effect that the probationary officer has given satisfaction and is therefore confirmed.

Reversion on account of exigencies of service, as senior officers have come back from deputation or from leave, cannot in our opinion amount to reduction in rank.

It may be added that the State Government would be entitled and (after the States Reorganisation Act) bound after the appointed day to treat the State as one whole unit and make such orders of transfer, as it thought fit, treating the whole State as one unit.

Reversion of junior most men in the list is not open to charge of discrimination based on the violation of rule 2 (c) of Hyderabad Police Manual.

Purshottam Trikamdas, Senior Advocate, (*R. Gopalakrishna*, Advocate, with him), for Appellants (In C.A.Nos. 972-977/63) and the Petitioners (In Petitions Nos. 64 and 90 to 94 of 1963).

R. Gopalakrishnan, Advocate, for Petitioners (In Ps. Nos. 173-174/63).

S. V. Gupte, Additional Solicitor-General of India, (*B.R.L. Iyengar* and *B.R.G.K. Achar*, Advocates, with him), for Respondent (In C.A.Nos. 972-977/63 and Ps.Nos. 64 and 90 to 94 of 1963).

B.R.L. Iyengar and *B.R.G.K. Achar*, Advocates, for Respondent (In Ps. Nos. 173 and 174 of 1963).

G.R.

Appeals and Petitions dismissed.

[SUPREME COURT.]

*P.B. Gajendragadkar, K.N. Wanchoo,
K.C. Das Gupta, J.C. Shah, and
N. Rajagopala Ayyangar, JJ.*
23rd January, 1964.

*Rani Ratnaprova Devi v.
The State of Orissa.*

Pet. Nos. 79,80 of 1963 and 140 of 1962.

Orissa Private Lands of Rulers (Assessment of Rent) Act, 1958—Articles 14, 31 and 366 of the Constitution—Meaning of the word 'Ruler'.

Having regard to the relevant factors prescribed by section 6 of Orissa Private Lands of Rulers (Assessment of Rent) Act (1958) it would not be unreasonable to take the view that fair and equitable tests have been laid down for determining the rent which should be assessed in respect of the private lands of the Rulers, and in the absence of any proof that there has been a material departure in that behalf, we

find it difficult to uphold the plea that section 6 can be attacked on the ground that it has contravened Article 14 of the Constitution.

The subject-matter of the levy consists of the private lands and the compendious way adopted by the Legislature in describing the said lands is that they are the private lands of the Rulers. It is in that connection that the word "Ruler" has been broadly defined in an inclusive manner. If the Legislature had said that the private lands of the Rulers as well as the private lands of the dependants and relatives of Rulers were liable to the levy permitted under section 3, the petitioners would not have been able to raise any objection because, then, it would have been unnecessary to define the word "Ruler" in a comprehensive way. Once it is conceded, as it must be, that the Orissa Legislature was competent to pass the Act under Entry 18 of List II of the Seventh Schedule, it is idle to suggest that the method adopted by the Act in describing the lands which are made liable to pay assessment, introduces any infirmity in the Act itself. Therefore, we are satisfied that the contention that the definition of the word "Ruler" is inconsistent with Article 366 (22) and that makes the whole Act void, is without any substance.

A.I.R. 1961 Orissa 131, approved.

S.N. Andley, Rameshwar Nath and P. L. Vohra, Advocates of *M/s. Rajinder Narain & Co.*, Advocates, for Petitioner (In Petitions Nos. 79-80 of 1963).

Sarjoo Prasad, Senior Advocate, (*Ajoy Kumar Gajdhar Mahapatra* and *A.D. Mathur*, Advocates, with him), for Petitioner (In Petition No. 140 of 1962).

S. V. Gupta, Additional Solicitor-General of India, (*S. B. Misra*, Government Pleader, Orissa and *R. Ganapathy Iyer* and *R. N. Sachithy*, Advocates, with him), Respondents (In all the Petitions).

M. C. Setalvad, Senior Advocate, *J. B. Dadachanji*, *Ravinder Narain* and *O.C. Mathur*, Advocates of *M/s. T. B. Dadachanji & Co.*, with him), for Interveners (In Petition No. 140 of 1962).

G.R.

Petitions dismissed.

[SUPREME COURT.]

K. Subba Rao and *J.R. Mudholkar*, JJ.
23rd January, 1964.

Kothamasu Kanakarathamma v.
The State of A.P.
C.A. No. 325 of 1962.

Land Acquisition Act (I of 1894), sections 12, 18, 21 and 30—Want of jurisdiction.

In *Alderson v. Palliser and another*, L.R. (1901) 2 K.B. 833, the Court of Appeal held that where the want of jurisdiction appears on the face of the proceedings, it cannot be waived. In *Seth Badri Prasad and others v. Seth Nagarmal and others*, (1959) S.C.J. 394 this Court has held that even the bar of illegality of a transaction though not pleaded in the Courts below can be allowed to be pleaded in this Court if it appears on the face of the pleading in the case. The High Court has however, based itself largely upon a decision of the Privy Council in *Venkata Krishnayya Garu v. Secretary of State*, 60 M.L.J. 399. In that case there was in fact a reference by the Collector to the Court but that reference was made by the Collector not upon the application of the person legally entitled to compensation but by a person whose claim to ownership of property had failed before the civil Court but who was still a party to the Land Acquisition proceedings. In our opinion that decision is distinguishable on the short ground that whereas here there is no reference at all by the Collector or the Land Acquisition Officer, in that case the Collector has made a reference though in making it he had committed an error of law in that he acted upon the application of a person who had been found to have no interest in the land. The Court had no jurisdiction to determine the amount of compensation and thus go behind the order of the Land Acquisition Officer.

K. Bhimasankaram, Senior Advocate, (*R. Ganapathy Iyer*, Advocate, with him), for Appellants.

P. Rama Reddy, T.V.R. Tatachari and *B.R.G.K. Achar*, Advocates, for Respondent No. 1.

G.R.

Appeal dismissed.

[SUPREME COURT.]

M. Hidayatullah and Raghubar Dayal, JJ.
24th January, 1964.

Faddi v. The State of M.P.
Cr. Ap. No. 210 of 1963.

Evidence Act (I of 1872), section 25—Scope—Section 162, Criminal Procedure Code (V of 1898)—Admissibility of the First Information Report.

It cannot be said that a First Information Report which is not a confession cannot be used as an admission under section 21 of the Evidence Act or as a relevant statement under any other provisions of that Act. A.I.R. 1960 Raj. 101 ; A.I.R. 1962 Raj. 3 and 1959 All. L.J. 340, approved.

K.K. Luthra, Advocate, (at State expense), for Appellant.

I.N. Shroff, Advocate, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

B.P. Sinha, C.J., K. Subba Rao, Raghubar Dayal N. Rajagopala Ayyangar, and J.R. Mudholkar, JJ.
29th January, 1964.

R. Chitralekha v. The State of Mysore.
C. As. Nos. 1056 and 1057 of 1963.

Constitution of India (1950), Article 166—Entry 11 of List II, Entry 66 of List I Entry 25 of List III of the Seventh Schedule of the Constitution—Mysore University Act, 1956, section 23—Articles 14 and 15, of the Constitution.

By Majority.—The Government has power to prescribe a machinery and also the criteria for admission of qualified students to Medical and Engineering Colleges run by the Government and, with the consent of the management of the Government Aided Colleges, to the said Colleges also.

It must be left to the authority concerned to adopt a suitable method. If in any particular case the selection committee abuses its power in violation of Article 14 of the Constitution, that may be a case for setting aside the result of a particular interview, as the High Court did in this case. Without better material it cannot be said that selection by interview in addition to the marks obtained in the written examination is itself bad as offending Article 14 of the Constitution.

The laying down of criteria for ascertainment of social and educational backwardness of a class is a complex problem depending upon many circumstances which may vary from State to State and even from place to place in a State. But what we intend to emphasize is that under no circumstance a "class" can be equated to a "caste" though the caste of an individual or a group of individuals may be considered along with other relevant factors in putting him in a particular class. We would also like to make it clear that if in a given situation caste is excluded in ascertaining a class within the meaning of Article 15 (4) of the Constitution, it does not vitiate the classification if it satisfied other tests.

S.K. Venkataranga Iyengar and R. Gopala Krishnan, Advocates, for Appellants (In both the Appeals).

C.K. Daphary, Attorney-General for India (*B.R.L. Iyengar and B.R.G.K. Achar*, Advocates, with him), for Respondents (In both the Appeals).

G.R.

Appeals dismissed.

[SUPREME COURT.]

*B.P. Sinha, C.J., K. Subba Rao, Raghubar Dayal,
N. Rajagopala Ayyangar, and
J.R. Mudholkar, JJ.*
27th January, 1964.

The Union of India v.
Indra Deo Kumar.
C.A.No. 579 of 1963.

Evidence of Act (I of 1872), section 123—"Head of department"—Personnel Officer under Railway Establishment Code—If can claim privilege.

The Chief Personnel Officer under the Railway Establishment Code is not head of the department for purposes of section 123 of the Evidence Act as he has been conferred the status of 'head of department' for particular purposes only and those purposes do not include the purpose of claiming privilege under section 123 of the Evidence Act.

N. S. Bindra, Senior Advocate, (*R. N. Sachthey*, Advocate, with him), for Appellant.

D. Goburdhan, Advocate, for Respondents Nos. 1 to 4.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*P.B. Gajendragadkar, A.K. Sarkar,
K.N. Wanchoo, K.C. Das Gupta and
N. Rajagopala Ayyangar, JJ.*
29th January, 1964.

*Smt. Godavari Shamrao Parulekar
and others v. The State of
Maharashtra.*
Cr. As. Nos. 109-111 of 1963.

Defence of India Rules, Rule 30—Criminal Procedure Code (V of 1898), section 491—Articles 14, 21 and 22 of the Constitution.

Distinguishing the present appeals from the two earlier appeals *Rameshwar Shaw v. District Magistrate, Burdwan*, Petition No. 145 of 1963, decided on 11th September, 1963 and *Makhan Singh Tarsikka v. State of Punjab*, Cr. A. No. 80 of 1963, decided on 11th October, 1963, the Court held that the principle of those two cases cannot be applied to a case where a fresh order of detention has been passed after the cancellation or revocation of an earlier order of detention. The contention therefore that the making of the order of detention on 10th November, 1962, or its service in jail in these cases, makes the detention illegal, must be negated.

In our opinion when the order says that it is necessary to make an order of detention in order to restrain the prejudicial activities mentioned therein it means that that was the only way which the State Government thought was necessary to adopt in order to meet the situation. It will then be for the detenu to show that the order had gone beyond the needs of the situation and was therefore contrary to section 44 of the Preventive Detention Act. No such thing has been shown in the present cases and we are satisfied that the orders in question cannot be said to go beyond the needs of the situation even assuming that section 44 is mandatory as urged on behalf of the appellant and not merely directory as urged on behalf of the state.

Appellants (In Cr. Nos. 109-110 of 1963) produced from jail and present in person.

Janardan Sharma, Advocate (Appellant also present in person), for Appellant (In Cr.A. No. 111 of 1963).

N.S. Bindra, Senior Advocate, (*R. H. Dhebar*, Advocate, with him), for Respondents (In Cr.A. Nos. 109-111 of 1963).

Purshottam Trikamdas, Senior Advocate, (*R. H. Dhebar*, Advocate, with him), for Respondent (In Cr. A. No. 110 of 1963).

G.R.

Appeals dismissed.

[SUPREME COURT.]

*P.B. Gajendragadkar, C.J., K.N. Wanchoo,
K. C. Das Gupta, J. C. Shah and
N. Rajagopala Ayyangar, JJ.*
3rd February, 1964.

The Indo-China Steam Navigation
Co., Ltd. v. Jasjit Singh, Addl.
Collector of Customs, Calcutta.
C.A. No. 770 of 1962 and
(Petition No. 138 of 1961.)

Sea Customs Act (VIII of 1878), section 52-A—Validity—Applicability—Confiscation of vessel—Articles 14, 19 and 31 (1) of the Constitution.

Jurisdiction of Supreme Court under Article 136 of the Constitution.

Where the Central Government exercises power of review against an administrative order it is subject to the appellate jurisdiction of the Supreme Court.

Section 52-A of the Sea Customs Act provides that no vessel constructed, adapted, altered, or fitted for the purpose of concealing goods shall enter, or be within the limits of any port in India, or the Indian customs waters. This section is the only section included in Chapter VI-A and it was inserted by Act X of 1957. The plain construction of this section appears to be that whenever a ship answering the description contained in its first part enters or is within the limits of any port in India, or the Indian customs waters, it contravenes the prohibition prescribed by it. The prohibition, is against the construction, adaptation alteration or fitting for the purpose of concealing goods. What has to be proved against a vessel which is charged with having contravened section 52-A is that there has been a construction, adaptation, alteration or fitting, and that the said construction, adaptation, alteration or fitting has been made for the purpose of concealing goods. Therefore, if an alteration in a vessel made for the purpose of concealing goods is proved, the contravention of section 52-A must be inferred. In other words, the section prohibits absolutely the entry of vessels which show that there has been any construction, adaptation, alteration or fitting made in them for the purpose of concealing goods.

Rights guaranteed to the citizens of India under Article 19 of the Constitution are not available to foreigners and pleas which may successfully be raised by the citizens on the strength of the said rights guaranteed under Article 19 would, therefore, not be available to foreigners. A foreigner cannot therefore resist the confiscation of his vessel under section 52-A relying on Article 31 (1). [No opinion on the validity of section 52-A under Articles 19 (1) (f) and 19 (5) was expressed in the instant case.]

Sachin Choudhury and B. Sen, Senior Advocates, (S.N. Mukherjee, Advocate, with them), for Appellant (In C.A. No. 770 of 1962) and the Petitioner (In Petition No. 138 of 1961).

S. V. Gupte, Additional Solicitor-General of India and D. R. Prem, Senior Advocate, (R.H. Dhebar, Advocate, with them), for Respondents (In C.A. No. 770 of 1962 and Petition No. 138 of 1961).

G.R.

Appeal and Petition dismissed.

[SUPREME COURT.]

*P. B. Gajendragadkar, C.J., K. N. Wanchoo,
K. C. Das Gupta, J. C. Shah and
N. Rajagopala Ayyangar, JJ.*
3rd February, 1964.

Haricharam Kurmi v.
The State of Bihar.
Cr. As. Nos. 208-209 of 1963.

Evidence Act (I of 1872), section 30—Confession by a co-accused—Evidentiary value.

Though confession may be regarded as evidence in that generic sense because of the provisions of section 30 of the Evidence Act it is not evidence as defined by section 3 of the Act. In dealing with a case against an accused person, the Court cannot start with the confession of a co-accused, it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the

quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. See (1952) S.C.R. 526 and L.R. 76 I.A. 147 (155).

Ram Prakash v. The State of Punjab, (1959) S.C.R. 1219, was not intended to strike a discordant note from the well-established principles in regard to the admissibility and the effect of confessional statements made by co-accused persons.

In criminal trials, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt.

T. V. R. Tatachari, Advocate, for Appellants. (In both the Appeals).

D. P. Singh and R. N. Sachthey, Advocates, for Respondent (In both the Appeals).

G.R.

Appeals allowed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J., K. N. Wanchoo,

Shyam Behari v.

K. C. Das Gupta, J. C. Shah, and

The State of M. P.

N. Rajagopala Ayyangar, J.J.

3rd February, 1964.

C.A. No. 177 of 1962.

Land Acquisition Act (I of 1894), sections 4 to 6 and 17—Public purpose—Test.

On reading the notification of 19th April, 1961, one can only come to the conclusion that the land was needed for a public purpose, namely, for the construction of some work for a factory. There is no mention of any company anywhere in this notification and it cannot necessarily be concluded that the Premier Refractory Factory was a company, for a "factory" is something very different from a "company" and may belong to a company or to Government or to a local body or even to an individual. The mere fact that the public purpose declared in the notification was for the Premier Refractory Factory and work connected therewith cannot lead to the inference that the acquisition was for a company. It follows that when the two notifications declared that the land was needed for a public purpose in a case where no part of the compensation was to come out of public revenues or some fund controlled or managed by a local authority they were invalid in view of Proviso to section 6 (1) of the Land Acquisition Act. All proceedings following on such notification would be of no effect under the Act.

(1961) 2 S.C.R. 459, relied upon.

Naunit Lal, Advocate, for Appellant.

I.N. Shroff, Advocate, for Respondents Nos. 1 to 4.

Rajani Patel and I.N. Shroff, for Intervener.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J., K. N. Wanchoo,

Masalti v. State of U.P.

K. C. Das Gupta and Raghubar

Dayal, J.J.

4th May, 1964.

Cr. As. Nos. 30-34 of 1964.

Penal Code (XLI of 1860), section 302 read with section 149—Murder by members of unlawful assembly—Death sentence—Confirmation—Duty of High Court—Criminal Procedure Code (V of 1898), sections 374 and 375.

It is perfectly true that in a murder trial when an accused person stands charged with the commission of an offence punishable under section 302 of the Penal Code

he stands the risk of being subjected to the highest penalty prescribed by the Indian Penal Code; and naturally judicial approach in dealing with such cases has to be cautious, circumspect and careful. In dealing with such appeals or reference proceedings where the question of confirming a death sentence is involved, the High Court has also to deal with the matter carefully and to examine all relevant and material circumstances before upholding the conviction and confirming the sentence of death. All arguments urged by the appellants and all material infirmities pressed before the High Court on their behalf must be scrupulously examined and considered before a final decision is reached. The fact that 10 persons had been ordered to be hanged by the trial judge necessarily imposed a more serious and onerous responsibility on the High Court in dealing with the present appeals.

In the instant case it cannot be said that the High Court had not bestowed due care and attention on the points involved in the case.

Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. The observations made in the case of *Baladin and others v. State of U.P.*, A.I.R. 1956 S.C. 181, must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition of law.

Having regard to the circumstances under which the unlawful assembly came to be formed, we are satisfied that these young men must have joined the unlawful assembly under pressure and influence of the elders of their respective families. The list of accused persons shows that the unlawful assembly was constituted by members of different families and having regard to the manner in which these factions ordinarily conduct themselves in villages, it would not be unreasonable to hold that these three young men must have been compelled to join the unlawful assembly that morning by their elders, and so, we think that the ends of justice would be met if the sentences of death imposed on them are modified into sentences of life imprisonment. Accordingly, we confirm the orders of conviction and sentence passed against all the appellants, except accused Nos. 9, 11 and 16 in whose cases the sentences are altered to those of imprisonment for life. In the result, the appeals are dismissed, subject to the said modification.

M.S.K. Sastri, Advocate (*Amicus Curiae*), for Appellant (In Cr. A. No. 30 of 1964).

I.M. Lall and *Ganpat Rai*, Advocates, for Appellants (In Cr. A. No. 31 of 1964).

Vir Sen Sawhney, Advocate, for Appellants (In Cr. As. Nos. 32-34 of 1964).

O. P. Rana and *C. P. Lall*, Advocates, for Respondent (In all Appeals).

G.R.

Appeals dismissed as modified.

THE SUPREME COURT OF INDIA

PRESENT :— B. P. SINHA, *Chief Justice*, K. SUBBA RAO, RAGHUBAR DAYAL, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Income-tax Officer, A Ward, Sitapur

.. Appellant*

v.

M/s. Murlidhar Bhagwan Das

.. Respondent

Hungerford investment Trust Ltd.

.. Intervener

(In Liquidation).

Income-tax Act (XI of 1922), section 34 (3), Proviso—Income Escaping Assessment—Re-assessment proceedings pursuant to finding or direction of Appellate Authority—Finding or direction confined to the year of assessment in question only—Saving of limitation.

Equality—Persons' income escaping assessment and not discovered for eight years—Persons escaping assessment falling within the scrutiny of Appellate Authority—Applicability of period of limitation—Reasonable classification and rational relationship with the object—No violation of equality clause under Article 14 of the Constitution.

Income-tax Act (XLIII of 1961), sections 149, 150.

The assessee, a firm, was assessed on the best judgment basis for the assessment year 1949-50. But the Officer for that year commenced proceedings under section 34 (1) (a) of the Act on the ground that an interest income of Rs. 88,737 had escaped assessment as the assessee had failed to disclose the same. The assessment for 1949-50 itself was cancelled under section 27 of the Act on 27th September, 1955. In the fresh assessment made for the assessment year 1949-50, the Officer ignoring the notice issued under section 34 (1) (a), included the interest income. On Appeal the Appellate Assistant Commissioner by his order dated 4th December, 1957, gave a finding that the interest income was assessable for the assessment year 1948-49 and not for the assessment year 1949-50. Pursuant to this finding, the Officer initiated proceedings under section 34 (1) of the Act in respect of the assessment year 1948-49 and the notice was served on the assessee on 5th December, 1957. The petition filed by the assessee to the High Court under Article 226 of the Constitution to quash the proceedings as being barred by time was allowed. The Department appealed to the Supreme Court.

Held, by Majority. The proviso to section 34 (3) of the Indian Income-tax Act, 1922, would not save the time-limit prescribed under section 34 (1) of the Act in respect of an escaped assessment of a year other than that which is the subject-matter of the appeal or the revision as the case may be.

Under the Act, year is the unit of assessment. The jurisdiction of the Tribunals in the hierarchy created by the Act is no higher than that of the Income-tax Officer and is confined to the year of assessment.

Assessment or re-assessment made under sections 27, 31, 33, 33-A, 33-B, 66 and 66-A or pursuant to the orders or directions made thereunder must necessarily relate to the assessment of the year under review, revision or appeal as the case may be. The proviso does not confer any fresh power upon the Officer to make assessments in respect of escaped incomes without any time limit. It only lifts the ban of limitation in respect of certain assessments made under certain provisions of the Act.

The expressions 'finding' and 'direction' mean a finding necessary for giving relief in respect of the assessment of the year in question, and a 'direction' which the appellate or revisional authority as the case may be, is empowered to give under the section. The words 'in consequence of or to give effect to, have to be collated with, and cannot enlarge, the scope of the finding or direction under the proviso.

The expression 'any person' in the setting in which it appears must be confined to a person intimately connected with the assessments of the year under appeal. Modification or setting aside of assessment made on a firm, joint Hindu family, or association of persons, for a particular year may affect the assessment for the said year on a partner or partners, of the firm, member or members of the Hindu undivided family, or the individual as the case may be.

Per Mudholkar, J. (for *Raghubar Dayal, J.* and himself)—Since the proceedings in pursuance of a notice under section 34 are necessarily independent of the assessment proceedings under section 22 with respect to a particular year, the proviso in question need not be so interpreted as to be limited to a direction made by the Appellate Authority while dealing with an appeal for that particular year. The fact that certain income has escaped assessment may come to the notice of an Appellate Authority in any case and it clearly appears to be the intention of the Legislature to require an Officer to take cognizance of it in the circumstances stated in the proviso.

The word 'finding' in the proviso to section 34 (3) of the Act must be given a wide significance so as to include not only findings necessary for the disposal of the appeal, but also findings which are incidental to it and would include the conclusion as to whether the income in question in the appeal was not received during the year to which the appeal relates.

No doubt, persons whose income have escaped assessment, and the fact that they have escaped assessment has not been discovered till after the lapse of eight years from the year in which they could have been assessed to tax on such income can be placed in one class. The Legislature in enacting the proviso to section 34 (3) has made a further or sub-classification by putting under one head those whose assessments have come up for scrutiny before an Appellate Authority and with respect to whose escaped assessment a judicial finding or direction is made by the Appellate Authority and under another head other assessees whose escaped income was not detected by the Appellate Authority and with respect to which no judicial finding or direction was therefore made by such authority.

There is a real difference between the two categories of assessees. *Prima facie* there is reasonable basis for the sub-classification and the grounds on which it is made, that is, discovered by a higher Authority and a judicial finding or direction made by it with respect to the facts. These grounds have rational relationship with the object which was intended to be achieved by the law, that is, to detect and bring to assessment the escaped income.

Appeal by Special Leave from the Judgment and Decree dated 17th March, 1959 of the Allahabad High Court in Miscellaneous Writ Petition No. 280 of 1958.

K. N. Rajagopal Sastry, Senior Advocate (*R. N. Sachthey*, Advocate, with him), for Appellant.

Bishan Narain, Senior Advocate (*G. C. Sharma*, Advocate and *O. C. Mathur*, *J. B. Dadachanji* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Respondent.

A. V. Viswanatha Sastri, Senior Advocate (*D. N. Mukherjee* and *B. N. Ghosh*, Advocates, with him), for Intervener.

The following Judgments of the Court were delivered :

Subba Rao, J. (for himself, *B. P. Sinha, C.J.* and *N. Rajagopala Ayyangar J.*) :—This appeal by Special Leave raises the question of the construction of the proviso to sub-section (3) of section 34 of the Indian Income-tax Act, 1922, as amended by Act XXV of 1953, hereinafter called the Act.

The facts lie in a small compass and they are as follows : The respondent is a firm carrying on business in different lines. It was assessed to income-tax under section 23 (4) of the Act for the assessment year 1949-50 on the ground that the notice issued under sub-sections (2) and (4) of section 22 of the Act had not been complied with. On September 27, 1955, the said assessment was cancelled under section 27 of the Act. But before the said cancellation it was found that an interest income of Rs. 88,737 in the shape of U.P. Encumbered Estates Act Bonds received by him in discharge of the debts due from third parties had escaped assessment as the assessee failed to disclose the same. The Income-tax Officer issued a notice under section 34 (1) (a) of the Act for the assessment year 1949-50 on the ground that the said sum of Rs. 88,737 had escaped assessment in the said assessment year. After the assessment of that year was set aside under section 27 of the Act, the Income-tax Officer, ignoring the notice issued by him under section 34 (1) (a) of the Act, included that amount in the fresh assessment made by him. The assessee preferred an appeal against that order and that was disposed of by the Appellate Assistant Commissioner on December 4, 1957. The Appellate Assistant Commissioner in his order held that the bonds were received by the assessee in the previous accounting year and, therefore, directed that the sum representing interest on the bonds should be deleted from the assessment for the year ending 1949-50 and included in the assessment for the year ending 1948-49. Pursuant to the direction given by the Appellate Assistant Commissioner the Income-tax Officer initiated proceedings under section 34 (1) of the Act in respect of the assessment year 1948-49. The notice issued under that section was served on the respondent on December 5, 1957. The assessee filed a petition under Article 226 of the Constitution in the High Court of Judicature at Allahabad for quashing the said proceedings, mainly on the ground that the proceedings were initiated beyond the time prescribed by section 34 of the Act. The High Court accepted the contention and quashed the proceedings initiated by the Income-tax Officer. Hence the appeal.

The proceedings would be in time, if the second proviso to section 34 (3) of the Act could be invoked. The question, therefore, is what is the true meaning of the terms of the second proviso to section 34 (3) of the Act. It reads :

" Provided further that nothing in this section limiting the time within which any action may be taken, or any order, assessment or re-assessment may be made shall apply to a re-assessment made under section 27 or to an assessment or re-assessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31, section 33, section 33-A, section 33-B, section 66 or section 66-A."

Prima facie this proviso lifts the ban of limitation imposed by the other provisions of the section in the matter of taking an action in respect of or making an order of assessment or re-assessment falling within the scope of the said proviso. The scope of the proviso is confined to an assessment or re-assessment made on the assessee or any person in consequence of an order to give effect to any finding or direction contained in any order made under section 31 *i.e.*, in an appeal before the Assistant Appellate Commissioner; under section 33, *i.e.*, in an appeal before the Tribunal; under section 33-A, *i.e.*, in a revision before the Commissioner; under section 33-B, *i.e.*, in a revision before the Commissioner against an order of the Income-tax Officer; and under sections 66 and 66-A *i.e.*, in a Reference to the High Court and appeal against the High Court's order to the Supreme Court. Learned Counsel for the appellant contends that the scope of the proviso is only confined to the assessment of the year that is the subject-matter of the appeal or the revision, as the case may be. Learned Counsel for the Department argues that the comprehensive phraseology used in the proviso takes in its broad sweep any finding given by the appropriate authority necessary for the disposal of the appeal or the revision, as the case may be, and to any direction given by the said authority to effectuate its finding, and that the said finding or direction may be in respect of any year or any person. As the phraseology used in the proviso is not clear or unambiguous, the question raised cannot be satisfactorily resolved without having a precise appreciation of a brief history of section 34 of the Act culminating in the enactment of the proviso in the present form.

Under section 3 of the Act, income-tax for any year shall be charged in respect of the total income of the previous year of every assessee. Notice under section 22 calling upon for return of income is the first step in the assessment proceedings. Two types of notices are mentioned in that section, namely, (i) the public notice and (ii) the individual notice. The public notice shall be issued on or before the 1st May of each year and the individual notice, may be issued at any time in the course of the assessment year. Income-tax proceedings, therefore, for a particular assessment year have to be initiated in the course of that year. But there may be cases of escaped assessment or under-assessment. Section 34 empowers the Income-tax Officer to take proceedings under that section both in respect of concealed income and also in *bona fide* cases where the income has escaped assessment or full assessment. Section 34 (1) (a) provides for the initiation of assessment proceedings in respect of concealed income and section 34 (1) (b) for other escaped income. Section 34 (1) has been amended from time to time. Under the said section, as it originally stood, the Income-tax Officer was empowered to initiate proceedings at any time within one year of the end of the year in respect whereof the income escaped assessment. By Act VII of 1939 that section was amended and "eight years" limitation from the end of the year was prescribed in respect of concealed income and a limitation of four years for other escaped income. Under Act XLVIII of 1948, the same periods of limitation were retained, but certain conditions were imposed. By the Finance Act of 1956, it was enacted that in the case of concealed income the proceedings could be initiated at any time within 4 years of the end of the relevant assessment year. Though no period of limitation was prescribed in respect of concealed income, three conditions were imposed, namely, (i) that an Income-tax Officer shall not issue a notice for any year prior to the year ending on 31st March, 1941, (ii) that if the escaped income was less than rupees one lakh, he shall not issue a notice if eight years have elapsed after the expiry of the relevant assessment year and (iii) that unless he has recorded his reasons and unless the Central Board of Revenue in any case falling under clause (2) of the proviso and in any other case, the Commissioner, is satisfied that for such reasons as recorded it is a fit case for the issue of a notice.

Before 1939, there was no period of limitation for completing the assessment once it had been initiated within the prescribed period of limitation. But Act VII of 1939 for the first time introduced clause (2) in section 34 whereunder

"no order of assessment under section 23 or of assessment or re-assessment under sub-section (i) of this section shall be made after the expiry, in any case to which clause (c) of sub-section (i) of section 28 applies, of eight years, and in any other case, of four years from the end of the year in which the income, profits or gains were first assessable."

Section 28 (i) (c) dealt with a case of an assessee concealing the particulars of his income or deliberately furnishing inaccurate particulars of his income. Act XXIII of 1941 inserted a proviso in section 34 (2) providing that "nothing contained in this sub-section shall apply to a re-assessment made in pursuance of an order under section 31, section 33, section 66 or section 66-A," i.e., provisions relating to appeals, revisions and references : that is to say, if the assessment made by the Income-tax Officer was set aside and a re-assessment was directed to be made, the said periods of limitation would not apply to such re-assessment. Act XLVIII of 1948 introduced sub-section (3) in section 34 in substitution of sub-section (2) thereof. Under that sub-section the period of limitation prescribed by sub-section (2) was retained, and the proviso to section 34 (2) before the amendment was made the second proviso, with some modifications, to the amended sub-section (3). While the scope of the previous proviso was confined only to the completion of re-assessment proceedings, the scope of the amended proviso is much wider in that it exempts the subject-matter of that proviso from the operation of the period of limitation prescribed by the section ; that is to say, it gives full scope to the operation of the substantive part of the section unhampered by the periods of limitation prescribed by sub-sections (1), (2) and (3) of section 34 of the Act. While the previous proviso lifted the ban only in regard to the period of limitation prescribed for the completion of the assessment, the new proviso lifted the ban even in respect of the initiation of proceedings under section 34 (1) of the Act. It follows that if a matter fell within the terms of the proviso, there would be no period of limitation for initiating an action or making an assessment or re-assessment in respect of that matter. Briefly stated, the said proviso is a proviso to the entire section 34. We shall consider the scope of the proviso at a later stage of our judgment. Then came the Finance Act of 1956. It amended section 34 (1) and introduced a proviso to the said sub-section, which we have noticed earlier. That proviso, while removing the period of limitation in respect of concealed income, imposed some condition in respect thereof, but the four-year period of limitation in respect of other escaped income was retained. We are not concerned in this appeal with the subsequent amendments.

The history of the section gives us the following background to the proviso under consideration. Broadly stated, under section 34, as it existed in 1956, (i) there was no time-limit for initiating proceedings under section 34 (1) in respect of concealed income, but such initiation could be made only subject to the conditions laid down in the proviso to section 34 (1) ; (ii) in the case of other escaped income, the proceedings could not be initiated after the expiry of 4 years from the end of the relevant assessment year ; (iii) the assessment proceedings once commenced shall be completed within the period of limitation prescribed under section 34 (3) ; and (iv) to a case to which the proviso to section 34 (3) applies, there is no period of limitation either for initiating the proceedings under section 34 or for completing the assessment commenced either under section 23 or under section 34 (1).

With this background let us give a closer look to the relevant terms of the proviso. The first part of the proviso released the operation of the proviso from the restrictions imposed by section 34 only in respect of the time-limit within which any action may be taken or any order of assessment or re-assessment may be made. It means that the proviso continues to be subject to the other restrictions imposed under the section and it cannot override the said provisions in that regard. Under the proviso, the period of limitation will not apply to a re-assessment made under section 27 or to an assessment or re-assessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31, section 33, section 33-B, section 66 or section 66-A of the Act. It was

not contended, nor was it possible to contend, that by reason of the reference to the said provisions the powers and jurisdiction conferred on the respective authorities, Tribunals or Courts referred to therein were enlarged or modified by a reference in the proviso or that the proviso could be read or construed as amending those sections conferring on those bodies wider or different powers or jurisdiction. Learned Counsel for the Department expressly disclaimed any such submission. Therefore, the scope of the proviso cannot ordinarily exceed the scope of the jurisdiction conferred on an authority under the said provisions. It is not, and cannot be, disputed that under the Income-tax Act, year is the unit of assessment. The Judicial Committee in *Commissioner of Income-tax v. S. M. Chitnavis*¹, pointed out :

“For the purpose of computing the yearly profits and gains, each year is a separate self-contained period, time, in regard to which profits earned or losses sustained before its commencement are irrelevant.”

This Court in *Sir Kikabhai Premchand v. Commissioner of Income-tax (Central), Bombay*², accepted this legal position when it said :

“.....for income-tax purposes, each year is a self-contained accounting period and we can only take into consideration income, profits and gains made in that year and are not concerned with potential profits which may be made in another year any more than we are with losses which may occur in the future.”

Indeed, the decision of an Income-tax Officer given in a particular year does not operate as *res judicata* in the matter of assessment of the subsequent years. The jurisdiction of the tribunals in the hierarchy created by the Act is no higher than that of the Income-tax Officer. It is also confined to the year of assessment. Under section 27 of the Act, the Income-tax Officer cancels the best judgment assessments made by him if the assessee shows that he was prevented by sufficient cause from making the return under section 22 of the Act. Section 31 prescribes the mode of disposal by an Assistant Appellate Commissioner of an appeal preferred to him : the appeal before him is certainly confined to an assessment year ; after hearing the appeal, he can either confirm, reduce, enhance or annul the assessment ; he can set aside the assessment and direct the Income-tax Officer to make a fresh assessment. The various sub-sections of that section describe in detail the orders or directions that can be made or issued by him in respect of various matters ; but no power is conferred on him to make an order or issue directions in respect of an assessment of a year which was not the subject-matter of the appeal. It may, therefore, be held on a construction of the provisions of section 31, that the jurisdiction of the Appellate Assistant Commissioner is strictly confined to the assessment orders of a particular year under appeal. Section 33, *inter alia*, deals with an appeal to the Tribunal against the order of the Appellate Assistant Commissioner under section 31 ; and section 33-B confers power of revision on the Commissioner against an order of the Income-tax Officer. The jurisdiction of the Appellate Tribunal or the Revisional Tribunal, as the provisions indicate, is confined only to the subject-matter which is under appeal or revision. The jurisdiction of the High Court or the Supreme Court under section 66 or section 66-B, as the case may be, is far more limited and it is confined only to the questions referred to them. Obviously the questions referred by the Tribunal cannot exceed its jurisdiction. It is, therefore, manifest that assessment or re-assessment made under the said sections or pursuant to the orders or directions made thereunder must necessarily relate to the assessment of the year under review, revision or appeal, as the case may be. It is important to remember that the proviso does not confer any fresh power upon the Income-tax Officer to make assessments in respect of escaped incomes without any time-limit. It only lifts the ban of limitation in respect of certain assessments made under certain provisions of the Act and the lifting of the ban cannot be so construed as to increase the jurisdiction of the Tribunals under the relevant section. The lifting of the ban was only to give effect to the orders

1. 63 M.L.J. 351 : (1932) L.R. 59 I.A. 290,
297 : A.I.R. 1932 P.C. 178.

2. 1953 S.C.J. 721 : (1953) 2 M.L.J. 810 :
(1954) S.C.R. 219, 222 : 24 I.T.R. 505.

that may be made by the appellate, revisional or reviewing tribunal within the scope of its jurisdiction. If the intention was to remove the period of limitation in respect of any assessment against any person, the proviso would not have been added as a proviso to sub-section (3) of section 34, which deals with completion of an assessment, but would have been added to sub-section (1) thereof.

Now, let us scrutinize the expressions on which strong reliance is placed for the contrary conclusion. The words relied upon are "section limiting the time", "any person", "in consequence of or to give effect to any finding or direction.". Pointing out that before the amendment the word "sub-section" was in the proviso but it was replaced by the expression "section", it is contended that this particular amendment will be otiose if it is confined to the assessment year under appeal, for it is said that under no circumstances the Income-tax Officer would have to initiate proceedings for the said year pursuant to an order made by an Appellate Assistant Commissioner. This contention is obviously untenable. The Appellate Assistant Commissioner or the Appellate Tribunal may set aside the notice itself for one reason or other and in that event the Income-tax Officer may have to initiate the proceedings once again in which case section 34 (1) will be attracted. The expression "finding or direction", the argument proceeds, is wide enough to take in at any rate a finding that is necessary to dispose of the appeal or directions which Appellate Assistant Commissioners have in practice been issuing in respect of assessments of the years other than those before them in appeal. What does the expression "finding" in the proviso to sub-section (3) of section 34 of the Act mean? "Finding" has not been defined in the Income-tax Act. Order 20, rule 5 of the Code of Civil Procedure reads :

"It suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon such separate, issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit."

Under this Order, a "finding" is, therefore a decision on an issue framed in a suit. The second part of the rule shows that such a finding shall be one which by its own force or in combination with findings on other issues should lead to the decision of the suit itself. That is to say, the finding shall be one which is necessary for the disposal of the suit. The scope of the meaning of the expression "finding" is considered by a Division Bench of the Allahabad High Court in *Pt. Hazari Lal v. Income-tax Officer, Kanpur*¹. There, the learned Judges pointed out :

"The word 'finding', interpreted in the sense indicated by us above, will only cover material questions which arise in a particular case for decision by the authority hearing the case or the appeal which, being necessary for passing the final order or giving the final decision in the appeal, has been the subject of controversy between the interested parties or on which the parties concerned have been given a hearing".

We agree with this definition of "finding". But a Full Bench of the same High Court in *Lakshman Prakash v. Commissioner of Income-tax, U.P.*², construed the word "finding" in a rather comprehensive way. Desai, C.J., speaking for the Court, observed :

"A finding is nothing but what one finds or decides and a decision on a question even though not absolutely necessary or not called for is a finding."

If that be the correct meaning, any finding on an irrelevant or extraneous matter would be a finding. That certainly cannot be the intention of the Legislature. The Madras High Court also in *A. S. Khader Ismail v. Income-tax Officer, Salem*³, gave a very wide interpretation to that word, though it did not go so far as the Full Bench of the Allahabad High Court. Ramachandra Iyer, J., as he then was, speaking for the Court, observed that the word "finding" in the proviso must be given a wide significance so as to include not only findings necessary, for the disposal of the appeal but also findings which were incidental to it. With respect, this interpretation also is inconsistent with the well-known meaning of that expression in the legal terminology. Indeed, learned Counsel for the respondent himself will not go so far, for he concedes that the expression "finding" cannot be any incidental finding,

1. (1960) 39 I.T.R. 265, 272 : A.I.R. 1960 All. 97 : I.L.R. (1959) All. 152.

2. (1963) 48 I.T.R. 705, 718 (F.B.).

3. (1963) 47 I.T.R. 16.

but says that it must be a conclusion on a material question necessary for the disposal of the appeal, though it need not necessarily conclude the appeal. This concession does not materially differ from the definition we have given, but the difference lies in the application of that definition to the finding given in the present case. A "finding", therefore, can be only that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. The Appellate Assistant Commissioner may hold, on the evidence, that the income shown by the assessee is not the income for the relevant year and thereby exclude that income from the assessment of the year under appeal. The finding in that context is that that income does not belong to the relevant year. He may incidentally find that the income belongs to another year, but that is not a finding necessary for the disposal of an appeal in respect of the year of assessment in question. The expression "direction" cannot be construed in vacuum, but must be collated to the directions which the Appellate Assistant Commissioner can give under section 31. Under that section he can give directions, *inter alia*, under section 31 (3) (b), (c) or (e) or section 31 (4). The expression "direction" in the proviso could only refer to the directions which the Appellate Assistant Commissioner or other Tribunals can issue under the powers conferred on him or them under the respective sections. Therefore, the expression "finding" as well as the expression "direction" can be given full meaning, namely, that the finding is a finding necessary for giving relief in respect of the assessment of the year in question and the direction is a direction which the appellate or revisional authority, as the case may be, is empowered to give under the sections mentioned therein. The words "in consequence of or to give effect to" do not create any difficulty, for they have to be collated with, and cannot enlarge, the scope of the finding or direction under the proviso. If the scope is limited as aforesaid, the said words also must be related to the scope of the findings and directions.

The words "any person", it is said, conclude the matter in favour of the Department. The expression "any person" in its widest connotation may take in any person, whether connected or not with the assessee, whose income for any year has escaped assessment; but this construction cannot be accepted, for the said expression is necessarily circumscribed by the scope of the subject-matter of the appeal or revision, as the case may be. That is to say, that person must be one who would be liable to be assessed for the whole or a part of the income that went into the assessment of the year under appeal or revision. If so construed, we must turn to section 31 to ascertain who is that person other than the appealing assessee who can be liable to be assessed for the income of the said assessment year. A combined reading of section 30 (1) and section 31 (3) of the Act indicates the cases where persons other than the appealing assessee might be affected by orders passed by the Appellate Commissioner. Modification or setting aside of assessment made on a firm, joint Hindu family, association of persons, for a particular year may affect the assessment for the said year on a partner or partners of the firm, member or members of the Hindu undivided family or the individual, as the case may be. In such cases though the latter are not *co nomine* parties to the appeal, their assessments depend upon the assessments on the former. The said instances are only illustrative. It is not necessary to pursue the matter further. We would, therefore, hold that the expression "any person" in the setting in which it appears must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal.

We shall now briefly touch upon the conflict of decisions on the question. The Full Bench of the Allahabad High Court in *Lakshman Prakash's Case*¹, overruled the decision of the Division Bench in *Pt. Hazari Lal's Case*². A Division Bench of the Madras High Court, consisting of Rajagopalan and Balakrishna Ayyar, JJ., in *Simrathmull v. Additional Income-tax Officers, Ootacamund*³, took the same view as the Full Bench of the Allahabad High Court in *Lakshman Prakash's Case*¹. But a

1. (1963) 48 I.T.R. 705, 718 (FB).

2. (1960) 39 I.T.R. 265, 272 : A.I.R. 1960

ALL. 97.

3. (1959) 2 M.L.J. 189 : I.L.R. (1959) Mad.

592 : 36 I.T.R. 41.

Division Bench of the Calcutta High Court, consisting of Bose, C.J., and Mookerjee, J., in *Brindaban Chundra Basak v. Income-tax Officer*¹, though it had not finally expressed any opinion on that, was inclined to accept the view expressed by the Division Bench of the Allahabad High Court in *Pt. Hazari Lal's Case*². We have gone through the decision carefully. For the reasons given by us, we agree with the view expressed by the Division Bench of the Allahabad High Court in *Pt. Hazari Lal's Case*², on the interpretation of the proviso to sub-section (3) of section 34 of the Act.

In the result, we hold that the said proviso would not save the time-limit prescribed under sub-section (1) of section 34 of the Act in respect of an escaped assessment of a year other than that which is the subject-matter of the appeal or the revision, as the case may be. It follows that the notice under section 34 (1-A) of the Act issued in the present case was clearly barred by limitation.

In this view no other question arises for our consideration.

In the result, the appeal fails and is dismissed with costs.

Mudholkar, J.—(*Raghubar Dayal, J.* and himself)—This is an appeal by Special Leave from the judgment of the Allahabad High Court in the writ petition under Article 226 of the Constitution quashing a notice under section 34 (1) of the Indian Income-tax Act, 1922, issued by the appellant, Income-tax Officer, A Ward, Sitapur on 5th December 1957, against respondent No. 4.

The relevant facts are briefly these :

For the assessment year 1949-50, corresponding to Samvat year 2005, the appellant made an *ex parte* assessment under section 23 (4) of the Act on 13th November, 1953 which he later set aside under section 27 of the Act. Before that he had issued a notice to the respondent firm under section 34 (1) (a) of the Act in respect of the same assessment year on the ground that a sum of Rs. 88,737 representing interest alleged to have been earned by the firm during that year had escaped assessment made under section 23 (4). After, however, fresh proceedings were taken under section 23 (3) by the appellant consequent upon his order under section 27 he proceeded to include in the assessment a sum of Rs. 88,737 which was alleged to have escaped assessment in the notice earlier issued under section 34 (1) (a) and made an assessment order on 31st January, 1957. Against this order the respondent preferred an appeal before the Appellate Assistant Commissioner in which he urged two main grounds and the one accepted by the Appellate Assistant Commissioner was that the aforesaid amount of interest was received by the firm in the accounting period of the previous assessment year and not in that of the year 1949-50. Upon this view, the Appellate Assistant Commissioner reduced the assessment and observed as follows in his order :

"I, therefore, hold that the amount in dispute should be deleted from the assessment for 1949-50 and that, instead, the Income-tax Officer should take steps to assess the amount for the assessment year 1948-49."

Treating this as a direction or finding of the Appellate Authority, the appellant issued the impugned notice dated 5th December, 1957, under section 34 (1) (a). The respondent immediately moved the High Court for quashing the aforesaid notice. The High Court quashed the notice on the ground that it was issued by the appellant beyond the ordinary period of limitation, overruling the appellant's contention that no period of limitation governed the notice inasmuch as the second proviso to section 34 (3) of the Act was attracted to the facts of the case. The High Court in doing so purported to follow its own decision in *Pt. Hazari Lal v. Income-tax Officer, Dist. II, Kanpur*³. Briefly stated, the view taken by the High Court is that the only direction which the Appellate Assistant Commissioner can competently give is one which

1. (1962) 46 I.T.R. 14.

2. (1960) 39 I.T.R. 265, 272 : A.I.R. 1960 All. 97.

is covered by section 31 of the Act and that since the appeal before him was confined to a particular assessment year, the direction must also be necessarily limited to a matter falling within that year. The High Court further held that if the direction be treated as based on a finding recorded by the Appellate Assistant Commissioner, that finding will have to be disregarded when applying the proviso. The correctness of the view taken by the High Court is challenged before us on behalf of the appellant. The relevant part of section 34 (3) and the second proviso thereto run thus:

"No order of assessment or re-assessment, other than an order of assessment under section 23 to which clause (c) of sub-section (1) of section 28 applies or an order of assessment or re-assessment in cases falling within clause (a) of sub-section (1) or sub-section (1-A) of this section shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable

* * * * *

Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or re-assessment may be made shall apply to a re-assessment made under section 27 or to an assessment or re-assessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31, section 33, section 33-A, section 33-B, section 66 or section 66-A."

This is how the provision stands as from 1st April, 1956, and it is not disputed before us that it is the amended provision which would apply to the present case. What is, however, contended on behalf of the respondent is that the only issue before an Income-tax Officer in every case being the assessment for a particular year and no other year, the direction or finding contemplated by the second proviso which the Appellate Authority could make must necessarily be limited to that year alone. The alternative contention is that if the second proviso is so construed as to permit of a direction or finding being made with respect to any other year, it is *ultra vires* being violative of Article 14 of the Constitution. It was further contended that since the amount in this case is below one lakh of rupees, the second proviso will not apply.

As regards the last point we may advert to our judgment delivered today in *K. C. Thomas, First Income-tax Officer, Bombay v. Vasant Hiralal Shah*¹, in which we have negatived a similar contention. For the reasons given there, we reject the argument of learned Counsel for the respondent. Coming to the first contention of the respondent, it is no doubt true that the whole scheme of the Income-tax Act is to confine the assessment pursuant to the notice given under section 22 to a particular year and particular year alone and in the proceeding before him he is bound to confine himself to the Income of that year. If income in previous years has escaped assessment, he has no power to bring it to assessment along with the income of a subsequent year. The only power which he has for bringing such income to assessment is to resort to the provisions of section 34 (1) and issue a separate notice with respect to it to the assessee and the Appellate Assistant Commissioner of Income-tax hearing an appeal from an order of assessment made by the Income-tax Officer is in no better position in this matter than the Income-tax Officer. All that is perfectly true. But the question which we have to consider is whether the wide language employed by the Legislature in enacting the second proviso should not be given its natural meaning. This proviso removes the bar of limitation enacted by section 34 (1) and its first two provisos not only with respect to the assessee but with respect to "any person" in certain circumstances. No doubt this Court has recently held in *S. C. Prashar and another v. Vasantsen Dvarkadas and others*², that the proviso in so far as it removes the bar of limitation with respect to persons other than the assessee, is invalid as it infringes the provisions of Article 14 of the Constitution. That, however, is a question apart; what we have to consider is the

1. C. A. No. 638 of 1962, decided on 29th January, 1964.

2. (1963) 1 I.T.J. 519 : (1963) 1 S.C.J. 687.

legislative intent, and for ascertaining it, it is legitimate to look also at that part of the enactment which has been held to be invalid. By permitting the Appellate Authority to make a finding or give a direction with respect to a person other than the assessee the Legislature has made it abundantly clear that for bringing escaped income to assessment the bar of limitation would not apply provided there is a finding or direction of the Appellate Authority that a particular item of income had escaped assessment and may, therefore, be brought to assessment. Under the operative portion of section 34 (1), the Income-tax Officer is empowered to give notice to an assessee in respect of escaped assessment. He can issue such notice under clause (a) thereof where income has escaped assessment due to any conduct on the part of the assessee and in such a case he can issue a notice at any time. Certain restrictions, however, have been placed upon his power by the first proviso to sub-section (1) of section 34, one of which is the period of limitation of eight years with respect to income of less than a lakh of rupees. The second proviso to sub-section (3) is a proviso to the whole of section 34 and would consequently apply to a case falling under section 34 (1) (a). The restrictions placed by the enacting provisions of section 34 (3) would not, as made clear in the second proviso, apply to such a case. Thus, the proviso in terms says that when a notice is issued under section 34 (1) (a), no question of limitation would arise when such notice is issued in pursuance of a direction or finding of an Appellate Authority. Since the proceeding in pursuance of a notice under section 34 is necessarily independent of the assessment proceedings under section 22 with respect to a particular year, the proviso in question need not be so interpreted as to be limited to a direction made by the Appellate Authority while dealing with an appeal for that particular year. The fact that certain income has escaped assessment may come to the notice of an Appellate Authority in any case and it clearly appears to be the intention of the Legislature to require an Income-tax Officer to take cognizance of it in the circumstances stated in the proviso.

It is, however, contended that the power of the Appellate Authority to make a direction or finding in any appeal before it is confined to matters specified in section 31 and that upon a proper construction of that provision, a direction or finding with respect to income of any particular year other than the one with respect to which there is an appeal before it, cannot be competently made by the Appellate Authority. In support of this contention reliance is placed upon the decisions in *Kamlapat Motilal v. Income-tax Officer and another*¹, *Hiralal Amritlal Shah v. K. C. Thomas, Income-tax Officer, Bombay*²; *Pt. Hazari Lal v. Income-tax Officer, Dist. II, Kanpur*³, *Brindaban Chandra Basak v. Income-tax Officer*⁴. In the first of these cases the learned Judges have observed :

"In our opinion the powers of the Appellate Tribunal under section 33 (4) are limited to the passing of such order as it thinks fit to make in the proceedings which are then before it on appeal, and in our judgment it has no power under this section to pass an order or give directions with reference to the proceedings of an earlier year which are concluded."

We may point out that section 33 (4) only refers to a finding or direction made by an Appellate Authority and does not itself confer any power on an Appellate Authority to make a finding or direction. Indeed, section 34 deals with entirely a different aspect, that of empowering an Income-tax Officer to bring to assessment escaped income, and has no concern with the powers of an Appellate Authority. The provision which deals with the powers of an Appellate Authority is section 31 and it is with that provision that we must concern ourselves primarily. The next case is not strictly relevant to this point. But the third one which is again a decision of the Allahabad High Court has proceeded to construe section 31 of the Act and we, therefore, have to consider it. After observing the scope of the orders which can be passed by the Appellate Authority under section 31 the learned Judges have observed :

1. (1956) 29 I.T.R. 192.
2. (1958) 34 I.T.R. 446.

3. (1960) 39 I.T.R. 265.
4. (1962) 46 I.T.R. 14.

"The very fact that the Appellate Assistant Commissioner of Income-tax, when making an order under section 31, is dealing with an appeal filed by an assessee in respect of an assessment order indicates the scope of his jurisdiction to give findings and to make consequential orders. The various orders, which an Appellate Assistant Commissioner of Income-tax can make, are detailed in section 31 (3) though there is no detailed provision about the findings which he can record. It appears to us, however, that, from the very nature of the jurisdiction which an Appellate Assistant Commissioner of Income-tax exercises, it must follow that his power of recording findings is limited to matters which he is called upon to decide when passing an order in appeal in conformity with the details laid down in section 31 (3). Any order passed by him, which is beyond the scope of section 31 (3), would be an order without jurisdiction and, similarly, any finding recorded by him, which is not necessary for the purpose of making an order covered by section 31 (3), would be a finding without jurisdiction. Further, when applying the second proviso to section 34 (3) of the Income-tax Act, the Income-tax Officer is only competent to take into account orders which are in conformity with the provisions of section 31 (3) and findings which are necessary for passing those orders. Orders, which are outside the scope of section 31 (3) or findings which are not at all necessary for making such orders, cannot be taken into account by the Income-tax Officer for the purpose relying on the second proviso to section 34 (3) which we are now considering." (P. 271).

The learned Judges have proceeded to hold that the word "finding" must be given the same meaning as that in the Code of Civil Procedure, that is, a decision of the Court. In other words, they seem to hold that a finding means only the final conclusion in the case. In support of this conclusion they placed reliance upon *S. C. Prashar v. Vasantsen Dwarkadas*¹.

Section 31 (3) of the Act confers certain express powers upon the Appellate Authority, one of which is to 'confirm, reduce, enhance or annul the assessment.' This power can be exercised only after the Appellate Authority arrives at some conclusions on facts. Thus, if an assessee wants to be exonerated from tax with respect to a particular item of income and sets out the grounds on which he bases his claim for exoneration the Appellate Authority has to consider them and arrive at its findings with regard to them before it can reduce or annul the assessment. It would follow, therefore, that the power to confirm, reduce, enhance or annul an assessment is implicit in the power of giving findings on the grounds on which a claim is made for one or the other of these results by the Department or the assessee. No express mention of such power was required in section 31 (3). When an appeal is before an Appellate Authority the whole matter is at large before it and, therefore, when a specific case is put before it by an assessee it has both the power as well as the duty to give its finding thereon. The ground given by the assessee for claiming a reduction or annulment of assessment may well be that the income upon which he has been assessed was not earned in the accounting period of the year to which the assessment pertains but in respect of a specified earlier or later year. The Appellate Authority is entitled to go into the whole question and come to a finding one way or the other, whether the income was earned in the year in which it was alleged by the assessee to have been earned or in the year with respect to which he has been assessed by the Income-tax Officer. To give a finding on this question would be obligatory upon the Appellate Authority and his duty to give a finding must necessarily be referable to the provisions of section 31 (3). We cannot accept the view of the Allahabad High Court that the word "finding" occurring in section 34(3) is susceptible of only one meaning, and that is that ascertainable from the Code of Civil Procedure. The finding of a tribunal is its conclusion on a point agitated before it and for a conclusion to amount to a finding it is not necessary that it should be the final and ultimate conclusion. We are, therefore, unable to accept the view taken by the Allahabad High Court. The last mentioned case does not decide the matter finally. But there the learned Judges have expressed a preference for the view taken by the Allahabad High Court as against that taken by the Madras High Court in *K. Simrathnnull v. Additional Income-tax Officer, Ootacamund*². In that case a similar argument to that urged before us and before the Allahabad High Court was advanced. Dealing with it the learned Judges have observed :

"To support this argument no authority was cited and it appears to us to be completely untenable. When an assessment is made and either the Department or the assessee appeals, the whole

1. (1956) 29 I.T.R. 557 : A.I.R. 1956 Bom. 530.

2. (1959) 2 M.L.J. 189 : I.L.R. (1959) Mad. 592.

matter would be before Assistant Commissioner, and no express provisions would be necessary to enable him to give directions in respect of a matter already before him. This would apply also to the Commissioner and the Income-tax Appellate Tribunal." (P. 47).

They then explained the reason for an express provision like the one contained in section 34 (3) by saying that it was necessary to have such provision so as to enable the Income-tax Officer to take action in pursuance of a finding recorded or direction given by an Appellate Authority. Finally they observed :

"To construe the proviso in the manner in which Mr. Subbaraya Aiyar invited us to do would be to make that proviso otiose."

With these observations we concur. This decision has been followed by the Bombay High Court in *General Construction and Supply Co. v. Income-tax Officer (8th) C Ward, Bombay*¹.

The same High Court has reaffirmed the view taken in *Simrathmull's Case*² in *A. S. Khader Ismail v. Income-tax Officer, Salem*³, and held that the word "finding" in the proviso to section 34 (3) must be given a wide significance so as to include not only findings necessary for the disposal of the appeal but also findings which are incidental to it and would include its conclusion as to whether the income in question in the appeal was not received during the year to which the appeal relates. Upon this view the High Court held that if in pursuance of such a finding, the Income-tax Officer proceeds to investigate afresh as to in which year the income was received, the action of the Income-tax Officer would still be the result of or the logical consequence of the finding arrived at for the purpose of the disposal of the appeal and the proviso to section 34 (3) would apply to such a case. The view taken by the High Court is in our judgment correct.

Thus in our view upon a construction of the relevant provisions we have no doubt that the notice was not in contravention of the provisions of section 34 of the Income-tax Act and could not be quashed on that ground.

The question then remains whether the second proviso below section 34 (3) is bad as offending Article 14 of the Constitution. In support of this contention reliance is placed by Mr. Bishan Narain for the respondent on the decisions of this Court in *Suraj Mall Mohata & Co. v. A. V. Viswanatha Sastri and another*⁴, and *S. C. Prashar and another v. Vasantsen Dwarkadas and others*⁵. In the first case it was held that both section 34 of the Income-tax Act and sub-section (4) of section 5 of the Taxation on Income (Investigation Commission) Act, 1947, deal with all persons who have similar characteristics and similar properties, that the procedure prescribed in the latter Act is substantially more prejudicial and more drastic to the assessee than the procedure under the former Act and that therefore, sub-section (4) of section 5 of the former Act in so far as it affects the persons proceeded against thereunder is void as offending the provisions of Article 14 of the Constitution. On the analogy of this case learned Counsel contends that the second proviso to section 34 (3) enabling a notice to issue only to an assessee in respect of escaped income without limit of time on the ground that an Appellate Authority has made a finding or direction in the proceeding before it makes a discrimination against such an assessee because it does not lift the bar of limitation with regard to other assessees, similarly situate, but with regard to whom no finding has been made or direction given by an Appellate Authority. No doubt, persons whose income have escaped assessment, and the fact that they have escaped assessment has not been discovered till after the lapse of eight years from the year in which they could have been assessed to tax on such income can be placed in one class. But surely it does not follow that even in that class there can be no further classification. The Legislature in enacting the particular provision has made a further or a sub-classification by putting under one head those whose assessments have come up for scrutiny before an Appellate Authority and with respect to whose escaped assessment a judicial finding or direc-

1. (1962) 44 I.T.R. 16.

2. (1959) 2 M.L.J. 189 : I.L.R. (1959) Mad. 592.

3. (1963) 47 I.T.R. 16.

4. 1954 S.C.J. 611.

5. (1963) 1 I.T.J. 519 : (1963) 1 S.C.J. 687.

tion is made by the Appellate Authority and under another head other assessee whose escaped income was not detected by the Appellate Authority and with respect to which no judicial finding or direction was, therefore made by such authority. There is a real difference between the two categories of assessee. *Prima facie* there is reasonable basis for the sub-classification and the grounds on which it is made, that is, discovery by a higher Income-tax Authority and a judicial finding or direction made with respect to the fact by it. These grounds have a rational relationship with the object which was intended to be achieved by the law, that is, to detect and bring to assessment the escaped income. (See for example *A. Thangal Kunju Musaliar v. M. Venkitachalam Potti and another*¹, where a further classification of war profiteers into those who had evaded substantial amount of income-tax and those whose evasion was not of a substantial amount was upheld). We can find nothing in the decision upon which reliance is placed which runs counter to our view. On the other hand we find ample support from the decision in *Balaji v. Income-tax Officer, Special Investigation Circle*², where it has been pointed out that the two tests of permissible classification under Article 14 (a) are that the classification must be founded on an intelligible differentia and (b) that the differentia must be reasonably connected with the object of the legislation, and that where they are satisfied by a statute, it does not violate Article 14 of the Constitution. As regards the other decision relied upon, it is sufficient to point out that the majority of the learned Judges have only struck down that part of the proviso which enables a notice to issue "to any person" on the ground that it is violative of Article 14. The precise question which we have before us does not appear to have been the subject of decision in the case. We are, therefore, unable to accept the contention of learned Counsel.

For the foregoing reasons we allow the appeal and quash the writ of *certiorari* issued by the High Court. It may be mentioned that in the absence of a stay of proceedings by the High Court the Income-tax Officer has actually made an assessment in pursuance of the impugned notice. That assessment will stand unless it is modified or annulled in any proceeding permitted by law. Costs of the appeal and the petition before the High Court will be borne by the respondent.

ORDER OF THE COURT :—In view of the judgment of the majority, the appeal fails and is dismissed with costs.

V. B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—B.P. SINHA, *Chief Justice*, P.B. GAJENDRAGADKAR, K.N. WANCHOO, K.C. DAS GUPTA AND J.C. SHAH, JJ.

Messrs. Pioneer Traders and another

.. *Petitioners**

v.

The Chief Controller of Imports and Exports, Pondicherry
and others (In all the Petitions).

.. *Respondents.*

Constitution of India, (1950), Article 32—Petition under—Government of India taking over administration of Pondicherry—Extension of Sea Customs Act (VIII of 1878) and Imports and Exports (Control) Act (XVIII of 1947) by notification S.R.O. No. 3315—Confiscation and penalty levied on goods on a misconstruction of para. 6 of S.R.O. No. 3315 by Authorities—Petition to quash proceedings and for direction of refund—Petition under Article 32 not maintainable.

The summary of the views of Judges who constituted the majority in the *Ujjaini's case* A.I.R. 1962 S.C. 1621 was that where an order of assessment is made by an authority with jurisdiction under a taxing statute which is *intra vires*, it is not open to challenge as repugnant to Article 19 (1) (g)

1. 1956 S.C.J. 323; A.I.R. 1956 S.C. 323. S.C. 123.
2. (1953) 1 S.C.J. 376; A.I.R. 1952

* Petitions Nos. 314 to 342 of 1951.

on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued thereunder and the validity of such an order cannot be questioned in a petition under Article 32 of the Constitution, though it may be open to question such an order on appeal or in revision in case the statute provides for that remedy or by a petition under Articles 226 and 227 of the Constitution in appropriate cases.

The decision of the Supreme Court in the case of *M/s. Universal Imports Agency*, (1961) 1 S.C.R. 305 was not based on the ground that the appropriate authority who confiscated the goods lacked inherent jurisdiction to do so. The decision, in substance, proceeded on the ground that in exercising the said jurisdiction, the authority had misconstrued S.R.O. No. 3315. The question as to whether a writ petition under Article 32 can lie on that ground was not raised before the Court and has not been considered.

The observation made by Kapur, J., in the case of *Ujjambai*, A.I.R. 1962 S.C. 1621 that the case of *M/s. Universal Imports Agency*, (1961) 1 S.C.R. 305 affords an instance of want of jurisdiction to tax transactions which the law excludes from the taxing powers of the authority levying the tax is not very accurate.

Similarly, it may be added that the inclusion of the said decision in the list of judgments cited by Das, J., which, in his opinion, illustrated categories of cases where executive authorities have acted without jurisdiction, is also not justified. Since the point about the competence of the writ petition was not raised or considered in the case of *M/s. Universal Imports Agency*, (1961) 1 S.C.R. 305 it would not be accurate or correct to hold that that decision turned on the absence of jurisdiction of the appropriate authority. It is well known that after the decision of the Court in the case of *Kailash Nath v. State of U.P.*, A.I.R. 1957 S.C. 790 some writ petitions were entertained on the ground that the jurisdiction of the Court under Article 32 could be invoked even if a tribunal exercising quasi-judicial authority had misconstrued the law under which it purported to act. Having regard to the decision of the Special Bench in *Ujjambai's case* A.I.R. 1962 S.C. 1621 these precedents have now lost their validity.

S.R.O. No. 3315 applied the Sea Customs Act and certain other Acts to the French Establishments, including Pondicherry, and para. 6 in particular is similar to a repealing and saving provision to be found in an Act which repeals and re-enacts an earlier enactment. It would therefore be not improper to read para. 6, as if it was incorporated in each one of the twenty-two Acts which were extended to the French Establishments by S.R.O. No. 3315. The construction therefore of para. 6 of the S.R.O. which must be deemed to have been inserted in each one of the Acts mentioned in the Schedule would be a construction of the Sea Customs Act itself. Therefore, an interpretation of para. 6 of the S.R.O. which must be deemed to have been inserted in the Sea Customs Act in place of original section 2 would be an interpretation of the Sea Customs Act. The Collector of Customs had inherent jurisdiction to deal with this matter and the only attack on his order and on the subsequent orders passed in appeal and revision is that they misconstrued the provisions of para. 6 of the S.R.O.

If the petitioners only raise the claim based on the press communiqué that they had placed firm orders before August 15, 1954, their claim has been negatived on facts and there is no reason to differ from the conclusion of the Collector on the facts. On the other hand, if the petitioners seem to have raised the case which they are now raising on the basis of *M/s. Universal Imports Agency's case* (1961) 1 S.C.R. 305 before the Board, the Board must be deemed to have turned down that claim and that could only be on the basis of the misconstruction of para. 6 of S.R.O. No. 3315. The case therefore is now put forward on behalf of the petitioners would be absolutely analogous to the position in *Ujjambai's case* A.I.R. 1962 S.C. 1621.

Per Das Gupta, J.—The substance of the matter is that the Collector assumed jurisdiction on the view that the Sea Customs Act applied to these cases: if the importations were on the basis of contracts concluded before 1st November 1954. The Sea Customs Act does not however apply to these cases. Therefore, the Collector acted without jurisdiction and the fact that the assumption of jurisdiction was based on the Collector's wrong decision, does not change that position. The writ petitions would therefore be maintainable, if the petitioner can satisfy the Court that the importations were made on the basis of contracts concluded before 1st November 1954.

Petitions under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

N. G. Chatterjee, Senior Advocate (*R. Ganapathy Iyer*, Advocate and *G. Gopalakrishnan*, Advocate of *M/s. Gagrati & Co.*, with him), for Petitioners (In all the Petitions)

C.K. Daphtary, Solicitor-General of India, (*B.R.L. Iyengar* and *R.H. Dhebar*, Advocates, with him), for Respondents (In all the Petitions).

The Court delivered the following judgments.

Wanchoo, J. (on behalf of the majority).—These twenty-nine petitions under Article 32 of the Constitution raise common questions and will be dealt with together. They have been filed by two firms who obtained *patentes* to carry on business in Pondicherry in September, 1954, for the first time. As the facts in all the petitions are similar, we shall only give the facts generally to understand the questions raised before us. The two firms, it may be mentioned, did not carry on any business in Pondicherry before September 1954, when they got a *patente* each and the proprietor

of one of them is a resident of New Delhi while the proprietor of the other is a resident of Bombay.

The administration of Pondicherry was taken over by the Union of India from 1st November, 1954. Before that Pondicherry was under the administration of the Government of France and was a free port. Import into Pondicherry was thus not subject to any restriction, except with regard to certain goods with which we are not concerned in the present petitions. Any merchant desiring to carry on business in the territory of Pondicherry had however to obtain a *patente* before he could do so. These *patentes* were of five kinds one of which was a *patente* authorising the trader to carry on the business of import of goods other than those which were under restriction. Though the importers were entitled by virtue of the *patente* to import goods subject to certain restrictions, this right could only be exercised by securing foreign exchange which was subject to certain limitations and was controlled by the Department of Economic Affairs at Pondicherry. There were two ways in which foreign exchange could be acquired, namely, (i) at the official rate through the Department of Economic Affairs, or (ii) in the open market at such rate as might be available; and both these ways were considered valid before 1st November, 1954. Further there used to be authorisations for the purpose of import and the authorisations indicated the limit within which foreign exchange could be acquired either at the official rate or through the open market.

The petitioners' case is that though the *patentes* were secured in September, 1954, orders for import were placed before 15th August, 1954. Thereafter after authorisations had been obtained from the French Authorities, foreign exchange was acquired in the open market for the purpose of financing the import. There were in all twenty-nine transactions by the two firms, which are the subject-matter of these petitions, and in certain cases advances were paid, the balance being payable by means of bills of exchange drawn on "documents against payment" basis. But though the orders were placed before 15th August, 1954 and necessary foreign exchange had also been secured in the open market later, shipments could not be made because of an unexpected dock strike in England and on the Continent and also for want of shipping space, and therefore most of the consignments on the basis of the twenty-nine orders were shipped after 1st November, 1954, and only three consignments out of twenty-nine could be shipped in October, 1954, that is before the administration of Pondicherry was taken over by the Government of India. The goods in all these cases arrived at Pondicherry after 1st November, 1954. In the meantime the administration of Pondicherry was taken over by the Government of India from 1st November, 1954, in pursuance of an agreement between the Government of India and the Government of France, and two notifications were issued by the Government of India, namely, S.R.Os. Nos. 3314 and 3315. By S.R.O. No. 3315, which was made under section 4 of the Foreign Jurisdiction Act, No. XLVII of 1947, the Sea Customs Act, 1878, the Reserve Bank of India Act, 1934, the Imports and Exports (Control) Act, 1947, the Foreign Exchange Regulation Act, 1947, and the Indian Tariff Act, 1934, were extended to Pondicherry. This S.R.O. contained a saving clause which laid down that:—

"Unless otherwise specially provided in the Schedule, all laws in force in the French Establishments immediately before the commencement of this Order, which correspond to the enactments specified in the Schedule, shall cease to have effect, save as respects things done or omitted to be done before such commencement."

As a consequence of these two S.R.Os. a Press Communique was issued by the Government of India on 1st November, 1954, explaining the effect of these notifications, in which it was stated that imports into and exports from the French Establishments would be regulated in accordance with the provisions of the Imports and Exports (Control) Act, 1947. It was further stated that as regards orders placed outside the Establishments and finalised through grant of a licence by competent French Authorities in accordance with the laws and regulations in force prior to 1st November, 1954, Licence-holders were advised to apply to the Controller of Imports and Exports for validation of licences held by them. Licence-holders were further advised

not to arrange for shipment of goods until the licences held by them had been validated by the Controller of Imports and Exports. In view of this Press Communique the petitioners tried to stop shipment until the authorisations held by them were validated by the Chief Controller of Imports and Exports, Pondicherry. But their suppliers told them that this could not be done, as the goods were in the course of shipment and it was too late to stop the shipment. The petitioners then applied for validation of the authorisations, but the Chief Controller of Imports and Exports, Pondicherry, refused to validate them. The petitioner's case is that this refusal was arbitrary. Eventually, when the goods arrived at Pondicherry after 1st November, 1954, the petitioners approached the Collector of Customs at Pondicherry to permit clearance of the goods. They were not however allowed to clear them, and notices were issued to them to show cause why the goods should not be forfeited on the ground that the import had been made in contravention of the Imports and Exports (Control) Act, 1947 and the Sea Customs Act, 1878. The petitioners thereupon showed cause and their case was that orders had been placed before 15th August, 1954 and the imports had been made strictly in accordance with the law in force in Pondicherry before 1st November, 1954 and therefore could not be said to be unauthorised. The Collector of Customs however refused to accept this explanation and ordered confiscation of the goods, and in the alternative imposed penalties for clearing them. These penalties amounted to over Rs. 64,000 in the case of one of the firms and over Rs. 96,000 in the case of the other firm. There were then appeals by the petitioners before the Central Board of Revenue against the orders imposing penalties. These appeals were dismissed, though the penalty was reduced to over Rs. 35,000 in the case of one firm and Rs. 60,000 in the case of the other firm. The petitioners then went in revision to the Government of India but their revisions were rejected on 23rd January, 1957. It appears that the petitioners paid the penalty though the date is not clear from the petitions and cleared the goods. The petitioners were apparently satisfied with the orders passed against them for they took no steps to go to Court after the revisions had been dismissed by the Government of India in January, 1957, though they say that they have been making representations to the Government of India in that behalf without any effect and that the last communication from the Government of India was received by them in this connection in August, 1961.

In the meantime certain importers of Pondicherry filed petitions in this Court in 1959 challenging the order of confiscation and the alternative order imposing penalties on them by the Collector of Customs, Pondicherry in somewhat similar circumstances: (see *M/s. Universal Imports Agency and another v. The Chief Controller of Imports and Exports and others*¹). Those petitions were decided on 23rd August, 1960 and this Court held that in view of para. 6 of S.R.O. No. 3315, already referred to, which saved the effect of all laws in force in the French Establishments immediately before the commencement of the Order even though those laws were repealed by the Order, with respect to things done or omitted to be done before such commencement, the authorisations granted by the French authorities before 1st November, 1954, for import were sufficient to protect the goods imported on the basis of those authorisations whether the exchange was secured officially or from the open market, from the operation of the Imports and Exports (Control) Act, 1947, and other provisions to the same effect. This view was taken on the ground that para. 6 saved "things done" before 1st November, 1954 and as firm contracts had been entered into and authorisations granted before 1st November, 1954, the subsequent arrival of goods in Pondicherry after 1st November, 1954, as the consequence of the contracts and the authorisations was a "thing done" under para. 6 of S.R.O. No. 3315. It was held that the words "things done" must be reasonably interpreted and if so interpreted they not only meant things done but also the legal consequence flowing therefrom. Consequently, it was held that the imported goods in those cases were not liable to confiscation under the Imports and Exports (Control)

Act and similar provisions of any other law, as firm contracts had been made before 1st November, 1954, and exchange had been arranged either officially or through the open market in full or in part under authorisations granted by the French Government, and the subsequent import after 1st November, 1954, was a consequence of these things which had been done before 1st November, 1954 and was therefore protected by para. 6. In the result the penalty collected was ordered to be refunded.

This decision was given in August, 1960 and it seems that after this decision, the petitioners wrote to the Government of India in September, 1960 for refund of penalties in their cases also; they were informed in February, 1961 that no refund could be made. The petitioners seem to have written again to the Government of India in June, 1961 and to this the Government of India gave a final reply in August, 1961. Thereafter the present writ petitions were filed in October, 1961. The petitioners rely on the decision of this Court in *Messrs. Universal Import Agency*¹, and contend that they are entitled to refund of penalty as their cases are exactly similar to the case of *Messrs. Universal Import Agency*¹. They pray for a writ, order or direction in the nature of *certiorari* quashing the orders resulting in the imposition of penalty beginning with the orders of the Collector of Customs, Pondicherry and ending with those of the Government of India in revision and also for a direction requiring the respondents to refund to the petitioners the sum realised as penalty.

The petitions have been opposed on behalf of the Union of India on a number of grounds. It is however unnecessary for us to detail all the grounds raised on behalf of the Union of India in view of an objection that has been taken to the maintainability of these petitions based on the decision of this Court in *Smt. Ujjambai v. The State of Uttar Pradesh and another*². We shall therefore refer only to such parts of the counter-affidavit filed on behalf of the Union of India as will suffice to explain the preliminary objection raised on its behalf.

The Union's case is that the talks for the *de facto* transfer of the French-Indian Establishments to the Government of India were resumed in August, 1954, and that as a result of these talks, an agreement dated 20th October, 1954, between the Government of India and the Government of France for the settlement of the question of the future of the French Establishments in India was arrived at. Pursuant to this agreement the administration of the French Establishments (including Pondicherry) was transferred to the Government of India from 1st November, 1954. In consequence, the Government of India promulgated two orders, namely, S.R.Os. 3314 and 3315 of 30th October, 1954, to come into force from 1st November, 1954. The first of these orders was known as the French Establishments (Administration) Order while the second order was known as the French Establishments (Applications of Laws) Order, 1954, by which the Sea Customs Act, 1878 and the Imports and Exports (Control) Act 1947 and certain other Acts were made applicable to the said settlements. Some persons including the petitioners who had no business in Pondicherry from before *mala fide* with intent to defeat the laws in force in the Indian Union which were legally to be extended to the French Establishments when their administration was taken over by the Government of India, managed to procure some colourable documents on the strength of which they claimed that they had placed firm orders with foreign firms for import of goods which were restricted under the Indian Import Control Regulations. After the Government of India had applied S.R.Os. 3314 and 3315 to the French Establishments and taken over their administration from 1st November, 1954, a press communique was issued on 1st November, 1954, that orders placed outside the French Establishments and finalised through a grant of licence by the competent French Authorities in accordance with the laws and regulations in force prior to 1st November, 1954, should be got validated by the Controller of Imports and Exports appointed for Pondicherry. Further, the licence-holders were advised not to arrange for shipments of goods until the licences held by them were validated. Later on 5th

1. (1961) 1 S.C.R. 335.

2. A.I.R. 1962 S.C. 1621.

January, 1955, the Union of India issued another press communique in view of certain representations received on the basis of Article 17 of the Indo-French Agreement and the public was informed that imports of goods against open market transactions after 1st November, 1954, would be treated as unauthorised. But having regard to the hardship likely to be caused to genuine importers who had placed orders in pursuance of their normal trading operations against which goods were in the normal course shipped by the suppliers prior to the date of merger, the Collector of Customs, Pondicherry, was being authorised to accord certain concessions to genuine importers. One of these concessions was that goods shipped before 1st November, 1954, but ordered before 15th August, 1954, would be cleared without penalty irrespective of origin and value. The petitioners tried to take advantage of this concession and therefore tried to show before the Collector of Customs, Pondicherry, that they had placed firm orders before 15th August, 1954, though shipments could only be made in three cases before 1st November, 1954, and were delayed in others because of dock strike in England and in Continental countries. This case was scrutinised by the Collector of Customs and he pointed out in his order that though the orders for these goods are said to have been placed before 15th August, 1954, the two firms could only start functioning in Pondicherry from the month of September in which month they had obtained *patente* for conducting business there legally. The Collector also pointed out that in the ordinary course of business, commitments were not made without entering into correspondence with the suppliers regarding the prices, terms of payment etc., but in these cases, the petitioners produced no such correspondence. It was also found that the petitioners had not done any business of this kind even in the Indian Union before this. The Collector therefore held that it had not been proved that the goods had in fact been ordered before 15th August, 1954 and therefore ordered their confiscation and imposed penalty in lieu thereof. The appeals of the petitioners to the Central Board of Revenue failed except to the extent that the penalty was reduced. The Board's order was silent on the point whether the goods had in fact been ordered before 15th August, 1954. But the Board held that as the goods were imported without licence at a time when a licence was required for their import, the appeal must fail. The petitioners then went in revision to the Government of India but failed there also.

The preliminary objection is that the orders imposing penalty are quasi-judicial orders passed by a competent authority having jurisdiction under a taxing statute. It is not the case of the petitioners that the statute under which the orders had been made read with S.R.O. 3315 of 1954 is in any way *ultra vires*. The sole basis of these petitions is that para. 6 of S.R.O. 3315 has been misconstrued by the authorities concerned and thus a penalty has been levied which could not be levied if para. 6 had not been misconstrued. The petitioners therefore question the validity of the order imposing penalty based on a misconstruction of para. 6 of S.R.O. 3315 of 1954 and this they cannot do by petition under Article 32, whatever other remedies they might have against such an order, in view of the decision of this Court in *Ujjambai's case*¹. It is therefore contended on behalf of the Union of India that these petitions under Article 32 of the Constitution are not maintainable and should be dismissed on this ground alone.

In reply it is submitted on behalf of the petitioners that *Ujjambai's case*¹, does not apply in the circumstances of these petitions. It is not seriously disputed that the orders imposing penalty were quasi-judicial orders; but it is urged that these orders were passed without jurisdiction and infringe the fundamental right of the petitioners under Article 19 (1) (f) and Article 19 (1) (g) and would be liable to challenge by petition under Article 32 and the actual decision in *Ujjambai's case*¹ will be not applicable.

It is therefore necessary to consider the effect of the decision in *Ujjambai's case*¹. That case was heard by a Bench of seven learned Judges of this Court, and the final decision was by a majority of five to two. The following two questions came up for decision in that case :—

"1. Is an order of assessment made by an authority under a taxing statute which is *intra vires*, open to challenge as repugnant to Article 19 (1) (g), on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued thereunder ?

2. Can the validity of such an order be questioned in a petition under Article 32 of the Constitution ?"

As was pointed out by Das, J., in that case, the two questions were inter-connected and substantially related to one matter, namely, "is the validity of an order made with jurisdiction under an Act which is *intra vires* and good law in all respects, or a notification properly issued thereunder, liable to be questioned in a petition under Article 32 of the Constitution on the sole ground that the provisions of the Act, or the terms of the notification issued thereunder, have been misconstrued?" It was not disputed in that case that where the statute or a provision thereof is *ultra vires*, any action taken under such *ultra vires* provision by a quasi-judicial authority which violates or threatens to violate a fundamental right does give rise to a question of enforcement of that right and a petition under Article 32 of the Constitution will lie. Further, it was not disputed that when the assessing authority sought to tax a transaction the taxation of which came within the constitutional prohibition, the violation of fundamental right must be taken to have been established and such cases were treated as on a par with those cases where the provision itself was *ultra vires*. It was also not disputed that where the statute was *intra vires* but the action taken under it was without inherent jurisdiction, a petition under Article 32 would lie. Finally, it was also disputed in that case that where the action taken is procedurally *ultra vires*, the case is assimilated to a case of an action taken without inherent jurisdiction and would be open to challenge by a petition under Article 32. The controversy was "what is the position with regard to an order made by a quasi-judicial authority in the undoubted exercise of its jurisdiction in pursuance of a provision of law which is admittedly *intra vires*?" It was in that connection where the authority has inherent jurisdiction to decide the matter and the law under which it proceeds is *intra vires* that the question arose whether the decision of such an authority could be challenged by a petition under Article 32 on the sole ground that it was based on a misconstruction of the provision of law or of the notification properly issued thereunder. Five of the learned Judges composing the Bench answered both the questions raised in that case in the negative. Das, J., held as follows :—

"An order of assessment made by an authority under a taxing statute which is *intra vires* and in the undoubted exercise of its jurisdiction cannot be challenged on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued thereunder. Nor can the validity of such an order be questioned in a petition under Article 32 of the Constitution."

Kapur, J., held as follows :—

"If the statute and its constitutionality is not challenged then every part of it is constitutionally valid including the provisions authorising the levying of a tax and the mode and procedure for assessment and appeals etc. A determination of a question by a Sales Tax Officer acting within his jurisdiction must be equally valid and legal. In such a case an erroneous construction, assuming it is erroneous, is in respect of a matter which the statute has given the authority complete jurisdiction to decide. The decision is therefore a valid act irrespective of its being erroneous."

"An order of assessment passed by a quasi-judicial tribunal under a statute which is *ultra vires* cannot be equated with an assessment order passed by that tribunal under an *intra vires* statute even though erroneous. The former being without authority of law is wholly unauthorised and has no existence in law and therefore the order is an infringement of fundamental rights under Article 19 (1) (f) and (g) and can be challenged under Article 32. The latter is not unconstitutional and has the protection of law being under the authority of a valid law and therefore it does not infringe any fundamental right and cannot be impugned under Article 32."

Sarkar, J., agreed with Das and Kapur, JJ.

Hidayatullah, J., held as follows :—

"But where the law is made validly and in conformity with the fundamental rights and the officer enforcing it acts with jurisdiction, other considerations arise. If, in the course of his duties, he has to construe provisions of law and misinterprets, it gives a right of appeal and revision, where such lie and in other appropriate cases, resort can be had to the provisions of Articles 226 and 227 of the Constitution, and the matter brought before this Court by further appeal. This is because every erroneous decision does not give rise to a breach of fundamental rights. Every right of appeal or revision cannot

be said to merge in the enforcement of fundamental rights. Such errors can only be corrected by the processes of appeals and revisions. Article 32 does not, as already stated, confer an appellate or revisional jurisdiction on this Court, and if the law is valid and the decision with jurisdiction, the protection of Article 265 is not destroyed. There is only one exception to this, and it lies within extremely narrow limits. That exception also bears upon jurisdiction, where by a misconstruction the State Officer or a quasi-judicial tribunal embarks upon an action wholly outside the pale of the law he is enforcing. If, in those circumstances, his action constitutes a breach of fundamental rights, then a petition under Article 32 may lie."

Mudholkar, J., summarised his conclusions as below :—

"1. The question of enforcement of a fundamental right will arise if a tax is assessed under a law which is (a) void under Article 13 or (b) is *ultra vires* the Constitution, or (c) where it is subordinate legislation, it is *ultra vires* the law under which it is made or inconsistent with any other law in force.

2. A similar question will also arise if the tax is assessed and or levied by an authority (a) other than the one empowered to do so under the taxing law or (b) in violation of the procedure prescribed by the law or (c) in colourable exercise of the powers conferred by the law.

3. No fundamental right is breached and consequently no question of enforcing a fundamental right arises where a tax is assessed and levied *bona fide* by a competent authority under a valid law by following the procedure laid down by that law, even though it be based upon an erroneous construction of the law except when by reason of the construction placed upon the law a tax is assessed and levied which is beyond the competence of the Legislature or is violative of the provisions of Part III or of any other provisions of the Constitutions.

4. A mere misconstruction of a provision of law does not render the decision of a quasi-judicial tribunal void (as being beyond its jurisdiction). It is a good and valid decision in law until and unless it is corrected in the appropriate manner. So long as that decision stands, despite its being erroneous, it must be regarded as one authorised by law and where, under such a decision a person is held liable to pay a tax that person cannot treat the decision as a nullity and contend that what is demanded of him is something which is not authorised by law. The position would be the same even though upon a proper construction, the law under which the decision was given did not authorise such a levy."

Mudholkar, J., therefore agreed with Das, J., and was of the view that the two questions must be answered in the negative.

The other two learned Judges, Subba Rao and Ayyangar, JJ., took the contrary view. They were of the view that there could be no valid distinction between an order passed by an authority without jurisdiction, in the sense that the authority is not duly constituted under the Act or that it has inherent want of jurisdiction, and a wrong order passed by the authority on a misconstruction of the relevant provisions of the Act; in either case if the order affects a fundamental right it will be open to challenge by petition under Article 32 on the ground that by a wrong construction, a fundamental right either under Article 19 (i) (f) or under Article 19 (i) (g) is violated.

It will be seen from the above summary of the views of the learned Judges who constituted the majority that, though the reasons given for coming to their conclusion were slightly different they were all agreed that where an order of assessment is made by an authority with jurisdiction under a taxing statute which is *intra vires* it is not open to challenge as repugnant to Article 19 (i) (g) on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued thereunder and the validity of such an order cannot be questioned in a petition under Article 32 of the Constitution though it may be open to question such an order on appeal or in revision in case the statute provides for that remedy or by a petition under Articles 226 and 227 in appropriate cases.

The contention on behalf of the Union is that the orders in the present cases are orders of an authority with jurisdiction acting quasi-judicially and even if they are based on a misconstruction of para. 6 of S.R.O. 3315 they will not be open to challenge by petition under Article 32 of the Constitution, whatever other remedies the petitioners might have against them. It is urged that in principle there is no difference between an order of assessment under a taxing statute and an order of confiscation, with an alternative penalty, for both are orders of a quasi-judicial authority under a taxing statute which is *intra vires*; and if orders are passed with jurisdiction in either case they will not be open to challenge under Article 32 on the sole ground that they are passed on a misconstruction of a provision of an Act or a notification issued thereunder.

It has not been disputed that the order of a customs authority imposing confiscation and penalties under section 167 (8) of the Sea Customs Act, (No. VIII of 1878) is quasi-judicial and the customs authority has the duty to act judicially in deciding the question of confiscation and penalty: (see *Leo Roy Frey v. The Superintendent, District Jail, Amritsar*¹. But it is urged on behalf of the petitioners that the orders in this case were passed without inherent jurisdiction and would thus be open to challenge and in this connection reliance was placed on the observations of Kapur, J., in *Ujjambai's case*², in connection with the decision in the case of *Messrs. Universal Imports Agency*³. Kapur J. observed with respect to this decision that "in any case this is an instance of want of jurisdiction to tax transactions which the law excludes from the taxing powers of the authority levying the tax", though he pointed out further that the question of the applicability of Article 32 to quasi-judicial determinations was not raised in that case. With respect, it may be pointed out that as the question of the applicability of Article 32 to quasi-judicial determinations was not raised at all in the case of *Messrs. Universal Imports Agency*,³ the Court had no occasion to consider the question whether the authority in that case had inherent jurisdiction to decide the matter. The majority judgment on which the petitioners rely has nowhere considered the question whether the authority in that case suffered from inherent lack of jurisdiction when it decided to confiscate the goods imported and levy penalties in the alternative. All that the learned counsel for the petitioners could draw our attention to was a sentence in the majority judgment to the following effect :

"We would, therefore, hold that paragraph 6 of the Order saves the transactions entered into by the petitioners and that the respondents had no right to confiscate their goods on the ground that they were imported without licence."

It is urged that when the majority said that the authorities had no right to confiscate the goods, it was meant that they had no inherent jurisdiction to do so. As we read the majority judgment, however, we do not find any warrant for coming to the conclusion that it was decided in that case that the authorities in that case had no inherent jurisdiction to confiscate the goods or impose penalties in lieu thereof. It is true that it was said in the majority judgment that the respondents had no right to confiscate the goods but that was because just before in that very sentence it was held that para. 6 of the Order saved the transactions. Therefore when the majority in that case said that the authorities had no right to confiscate the goods, all that was meant was that the authorities had misconstrued para. 6 and so confiscated the goods, but that on a correct construction of para. 6 they could not do so. It cannot therefore be said that the majority decision in that case was based on lack of inherent jurisdiction. The petitioners therefore cannot get out of the decision in *Ujjambai's case*², on the ground that the authorities who confiscated the goods and levied penalties in the alternative in the present cases had no inherent jurisdiction to do so.

As we have just indicated, the decision of this Court in the case of *Messrs. Universal Imports Agency*³, was not based on the ground that the appropriate authority who confiscated the goods lacked inherent jurisdiction to do so. The decision, in substance, proceeded on the ground that in exercising the said jurisdiction, the authority had misconstrued S.R.O. 3315. The question as to whether a writ petition under Article 32 can lie on that ground was not raised before the Court and has not been considered. Therefore, it seems to us, with respect, that the observation made by Kapur, J., in the case of *Ujjambai*², that the decision in the case of *Messrs. Universal Imports Agency*³, affords an instance of want of jurisdiction to tax transactions which the law excludes from the taxing powers of the authority levying the tax, is not very accurate. Similarly, it may be added that the inclusion of the said decision in the list of judgments cited by Das, J., which, in his opinion, illustrated categories of cases where executive authorities have acted without jurisdiction, is also not justified. Since the point about the competence of the writ petition was not raised or

1. (1939) S.C.J. 301 : (1938) M.L.J. (C-1) 269 : (1938) S.C.R. 822.

2. A.I.R. 1952 S.C. 1621.
3. (1951) 1 S.C.R. 305.

considered in the case of *Messrs. Universal Imports Agency*¹, it would not be accurate or correct to hold that that decision turned on the absence of jurisdiction of the appropriate authority. It is well known that after the decision of the Court in the case of *Kailash Nath v. State of U.P.*,² some writ petitions were entertained on the ground that the jurisdiction of the Court under Article 32 could be invoked even if a tribunal exercising quasi-judicial authority had misconstrued the law under which it purported to act. Having regard to the decision of the Special Bench in the case of *Ujjambai*³, these precedents have now lost their validity.

Then we come to the question whether this is a case of misconstruction of a provision of the law which is *intra vires* by an authority acting under a taxing statute. It is contended on behalf of the petitioners that the taxing statute in this case was the Sea Customs Act and the misconstruction, if any, would be of para. 6 of S.R.O. 3315. This in our opinion is not correct. The Sea Customs Act was applied to Pondicherry by S.R.O. 3315. This S.R.O. has six paragraphs. The first paragraph gives the name of the S.R.O. and the date from which it will come into force. The second paragraph defines what are "French Establishments" to which the S.R.O. was applicable. The third paragraph lays down that certain Acts mentioned in the Schedule which are twenty-two in number would apply to the French Establishments subject to certain conditions which are not material. Sub-paragraph (2) of para. 3 applies all rules under the various enactments in the Schedule to the French Establishments. Paragraph 4 lays down how references in any enactment, notification, rule, order or regulation applied to the French Establishments have to be construed. Paragraph 5 gives power to any Court, tribunal or authority required or empowered to enforce in the French Establishments any enactment specified in the Schedule to construe the enactment with such alterations, not affecting the substance, as may be necessary or proper. Then comes para. 6 which we have already set out. It will be seen therefore that S.R.O. 3315 applied the Sea Customs Act and certain other Acts to the French Establishments, including Pondicherry, and para. 6 in particular is similar to a repealing and saving provision to be found in an Act which repeals and re-enacts an earlier enactment. It would therefore be not improper to read para 6, as if it was incorporated in each one of the twenty-two Acts which were extended to the French Establishments by S.R.O. 3315. The construction therefore of para. 6 of the S.R.O. which must be deemed to have been inserted in each one of the Acts mentioned in Schedule would be a construction of the Sea Customs Act itself. Original section 2 in the Customs Act provided for repeal of earlier enactments and for saving, (though it no longer exists in the Act as it was repealed by the Repealing Act No. 1 of 1938). In effect, therefore, para. 6 of the S.R.O. would take the place of original section 2 of the Sea Customs Act. Therefore, an interpretation of para. 6 of the S.R.O. which must be deemed to have been inserted in the Sea Customs Act in place of original section 2 would be an interpretation of the Sea Customs Act. So the contention that *Ujjambai's case*³ does not apply, for there has been no misconstruction of any of the provisions of the Sea Customs Act has no force. It may be added that it is not disputed in this case that the Collector of Customs had inherent jurisdiction to deal with this matter and the only attack on his order and on the subsequent orders passed in appeal and revision is that they misconstrue the provisions of para. 6 of the S.R.O.

Finally, it is urged that there was in fact no misconstruction, of the provisions of para. 6 of S.R.O. 3315 in these cases and *Ujjambai's case*³, will not apply to these petitions. Literally speaking, it may be correct to say that there was no actual misconstruction of para. 6 of S.R.O. 3315 in these cases by the Collector of Customs. What had happened was, as we have already indicated, that the petitioners tried to bring their case before him within the terms of the Press Communique of 5th January, 1955, by which certain concessions were extended to genuine importers. They therefore tried to prove that they had placed firm orders before 15th August, 1954 and had also provided for foreign exchange to the extent necessary after receipt.

1. (1961) 1 S.C.R. 305.
2. A.I.R. 1957 S.C. 790.

3. A.I.R. 1962 S.C. 1621.

ing authorisations and that three of the consignments had been shipped before the 1st of November while the other twenty-six could not be shipped before that date for reasons beyond their control. The petitioners thus wanted to take advantage of the concessions in the Press Communiqué. They do not seem to have raised before the Collector of Customs the question that even if they had not placed the orders before 15th August, they would still be entitled to the benefit of para. 6 of S.R.O. 3315 if they had placed the orders before 1st November, 1954 and had received authorisations from the French Authorities before 1st November, 1954 and had made arrangements to the extent necessary for foreign exchange either through official channels or through open market. The Collector considered the case put forward by the petitioners namely, that they had placed firm orders before 15th August, 1954 and held, for reasons which we have already indicated, that that could not be true. The Collector therefore refused to give the petitioners the benefit of the Press Communiqué. In the circumstances the Collector could not proceed further to consider that even if the orders were placed after 15th August, the petitioners would be protected by para. 6 of the S.R.O. 3315.

The Board in appeal however did not rest its decision on this. It held that as the goods were actually imported after 1st November, 1954, when licence restrictions were actually in force, the goods would be liable to confiscation as imported without licence. This decision, in effect, refused to give the benefit of para. 6 of S.R.O. 3315 to the petitioners and to that extent the paragraph can by implications be said to have been misconstrued by the Board.

This matter can therefore be looked at in two ways. If it is held that the petitioners rested their case on only the ground that they had placed the orders for import before 15th August, 1954 and were thus entitled to the benefit of the press communiqué, the finding of the Collector to the effect that he was not prepared to believe that case for three reasons given by him cannot be said to justify a prayer for a writ because it is a finding of fact; and a writ cannot issue even if the said finding is erroneous. If, therefore, that was all that was raised by the petitioners before the authorities concerned, and the authorities concerned have found against the petitioners on the main question of fact involved in their contentions before them, it cannot be said that the authorities were wrong in the view they took for the reasons given by them and there would therefore be no question of any interference under Article 32. Further, if a petition under Article 32 is not maintainable when there is a mistake of fact though as we have indicated already, it cannot be said in this case that the Collector was wrong in his conclusion on the facts.

The petitioners' case, as put forward in this Court, is that even if firm orders were not placed before 15th August, 1954, they were entitled to take advantage of the judgment of this Court in *Messrs. Universal Imports Agency's case*¹, if they had placed orders after obtaining the *patentes* in September and had received authorisations and had arranged for foreign exchange to the extent necessary before 1st November, 1954. If this is the case of the petitioners, now, and they want to succeed on it, it must be held that the Board by implication negatived it in appeal. This could only be done by a misconstruction of para. 6 of S.R.O. 3315, for if that paragraph had been rightly construed, as held by this Court in *Messrs Universal Imports Agency's case*¹, the goods would not have been confiscated.

Therefore, the position is this. If the petitioners only raise the claim based on the press communiqué that they had placed firm orders before 15th August, 1954, their claim has been negatived on facts and we see no reason to differ from the conclusion of the Collector on the facts. On the other hand, if the petitioners seem to have raised the case which they are now raising before us on the basis of *Messrs. Universal Imports Agency's case*¹, before the Board, the Board must be deemed to have turned down that claim and that could only be on the basis of the misconstruction

tion of para. 6 of S.R.O. 3315. The case therefore that is now put forward on behalf of the petitioners before us would be absolutely analogous to the position in *Ujjambai's case*¹. In that case the assessing authority acting with jurisdiction upon a misconstruction of a statute which was *intra vires* or a notification properly issued thereunder assessed the tax and it was held that such an assessment cannot be impugned as repugnant to Article 19 (1) (f) and (g) on the sole ground that it was based on a misconstruction of a provision of the Act and the validity of such an order cannot be questioned in a petition under Article 32. In the present case, a similar quasi-judicial authority *i.e.*, the Board acting judicially within its jurisdiction must be deemed to have turned down by implication the contention raised on the basis of para. 6 of S.R.O. 3315 by the petitioners before it and this could only be done on the misconstruction of that paragraph in view of the decision in *Messrs. Universal Imports Agency's case*². The petitioners however cannot question the validity of those orders by petition under Article 32 of the Constitution, for the Act under which the orders were passed read with S.R.O. 3315 is not assailed as *ultra vires* and the only ground on which it is said that a fundamental right has been violated is that there has been by implication a misconstruction of para. 6 of S.R.O. 3315 by the Board. In that view the decision in *Ujjambai's case*¹, will apply with full force to the present petitions. We therefore hold that the validity of the orders impugned cannot be questioned in a petition under Article 32 of the Constitution. The petitions are hereby dismissed with costs—one set of hearing costs.

Das Gupta, J.—In sixteen petitions under Article 32 of the Constitution the petitioner, a merchant carrying on business under the name and style, Messrs. Eastern Overseas (Pondicherry), seeks relief against the orders by which the Collector of Customs purporting to act under section 167 (8) of the Sea Customs Act read with section 3 (2) of the Imports and Exports Control Act, 1947, directed confiscation of goods which he had imported into Pondicherry, at the same time giving him option to pay in lieu of confiscation, fines aggregating in all the sixteen cases to Rs. 96,400. The appeals against these orders to the Central Board of Revenue were unsuccessful except that the penalty of the fine payable was reduced to a total sum of Rs. 60,235. The petitioners then moved the Government of India for revision of these orders but the revision applications were rejected.

Shortly stated, the petitioner's case is that in all the sixteen cases he had concluded, before 1st November, 1954, firm contracts with foreign suppliers for supply of these goods by shipment to Pondicherry and it was on these contracts that the goods in question were imported by him. By the date the goods reached Pondicherry the Sea Customs Act had become applicable to Pondicherry, as a result of an order made by the Government of India on 30th October, 1954—the S.R.O. No. 3315. This order was made under section 4 of the Foreign Jurisdiction Act, 1947, in pursuance of the Indo-French Agreement under which the administration of Pondicherry was vested with the Government of India from 1st November, 1954. Para. 6 of that order however contained a saving clause. By reason of that the Sea Customs Act did not apply to the imports made by him. That paragraph is in these words:—

"Unless otherwise specifically provided in the Schedule, all laws in force in the French Establishments immediately before the commencement of the order, which correspond to enactments specified in the Schedule, shall cease to have effect, save as respect things done, or omitted to be done before such commencement."

It was held by this Court in *Universal Imports Agency v. The Chief Controller of Imports & Exports*², that importations of goods into Pondicherry after 1st November, 1954, would have the benefit of this saving clause, if the importation is in pursuance of a contract concluded prior to 1st November, 1954. The petitioner bases his case on the law as settled by this Court in the case mentioned above and contends that as the Sea Customs Act was not applicable to the importations of the goods, in these sixteen cases, the importations being in pursuance of contracts concluded before

1. A.I.R. 1962 S.C. 1621.

2. (1951) 1 S.C.R. 305.

1st November, 1954, the orders of confiscation of his property and the orders of penalty made upon him were illegal. There has thus been by these orders an invasion of the petitioner's fundamental right under Article 19 (1) (f) of the Constitution and for the protection of that right these petitions have been made.

The respondent contends that the basis of the petitioner's case that the importations were in pursuance of a contract concluded before 1st November, 1954, has not been established. Apart from this defence on merits, a preliminary objection is raised at the hearing on the authority of the decision of this Court in *Smt. Ujjam Bai v. The State of U. P. & Others*¹, that a petition under Article 32 does not lie. The argument is that the order of confiscation and penalty has been made by an authority under a statute which is *intra vires* and in the undoubted exercise of its jurisdiction. The validity of such an order cannot therefore be called in question in a petition under Article 32 of the Constitution even though the authority may have misconstrued the provisions of para. 6 of S.R.O. 3315.

In resisting the preliminary objection Mr. N.C. Chatterjee has argued on behalf of the petitioner that all these 16 cases are cases of a quasi-judicial authority acting without jurisdiction and so, the decision in *Ujjam Bai's case*¹, far from creating any difficulty in the way of the issue of a writ, definitely helps the petitioner. It is not disputed that in deciding the preliminary objection the Court has to proceed on the basis that the petitioner's allegations about the importations having been made on the basis of contracts concluded before 1st November, 1954, are correct. The necessary consequence of this fact, it is argued, is that the Sea Customs Act would not apply to these cases of importations and consequently the Collector of Customs, an officer, who derives his jurisdiction from the Sea Customs Act, would have no jurisdiction to make any order in respect of them. In my opinion, there is considerable force in the argument and the preliminary objection raised on behalf of the Respondent should fail.

The majority decision in *Ujjam Bai's case*¹ is clear authority for the proposition, that an order of confiscation or penalty made by an authority under a statutory provision which is *intra vires* cannot be questioned in a petition under Article 32 of the Constitution on the ground that it has been passed under a mis-construction of the provision of law, provided the order is made "in the undoubted exercise of its jurisdiction." *Ujjam Bai's case*¹ also appears however, to be equally clear authority for the proposition that

"if a quasi judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing an error as to a collateral fact and the resultant action threatens or violates a fundamental right the question of enforcement of that right arises and a petition under Article 32 will lie."

This proposition has been recently reiterated by a Bench of five judges of this Court in *The State Trading Corporation of India v. The State of Mysore & another*². In that case also an objection was raised on the authority of *Ujjam Bai's case*¹ to the maintainability of writ petitions under Article 32 of the Constitution. Repelling the objection, Sarkar, J., speaking for the Court observed :—

"It was however said that the petitions were incompetent in view of our decision in *Ujjam Bai v. State of Uttar Pradesh*¹ inasmuch as the Taxing Officers under the Mysore Acts had jurisdiction to decide whether a particular sale was an inter-State sale or not and any error committed by them as a quasi-judicial tribunal in exercise of such jurisdiction did not offend any fundamental right. But we think that that case is clearly distinguishable. Das, J., there stated that "if a quasi-judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing an error as to a collateral fact and the resultant action threatens or violates a fundamental right, the question of enforcement of that right arises and a petition under Article 32 will lie." He also said that where a statute is *intra vires* but the action taken is without jurisdiction, then a petition under Article 32 would be competent. That is the case here. There is no dispute that the taxing officer had no jurisdiction to tax inter-State sales, there being a constitutional prohibition against a State taxing them. He could not give himself jurisdiction to do so by deciding a collateral fact wrongly. That is what he seems to have done here. Therefore, we think the decision in *Ujjam Bai's Case*¹ is not applicable to the present case and the petitions are fully competent."

It is hardly necessary to cite any further authority for the proposition that an inferior tribunal cannot give to itself jurisdiction by deciding a collateral fact wrongly. I shall only refer to the decision in *Rex v. Shoreditch Assessment Committee*¹, where the matter was discussed in picturesque language thus:

"No tribunal of interior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction :..... a Court with jurisdiction confined to the city of London cannot extend such jurisdiction by finding as a fact that Piccadilly Circus is in the ward of Chepe."

What has happened in the cases now before us is that the Collector who has jurisdiction only in cases coming under the Sea Customs Act has assumed jurisdiction, on a wrong finding that the Sea Customs Act applies to these cases, even though in law it does not.

There is no escape from the conclusion that on the authority of this Court's decision in *Messrs. Universal Imports Agency & Another v. The Chief Controller of Imports and Exports*², the Sea Customs Act will not apply and the law formerly in force in the French Establishments, immediately before 1st November, 1954, would apply, in respect of all importations into Pondicherry made on the basis of contracts concluded before 1st November, 1954. On the assumption which, as already stated, must be made in considering the preliminary objection, that the importations in these cases were made on the basis of contracts concluded before 1st November, 1954, the irresistible conclusion is that the Sea Customs Act had no application to these cases. It necessarily follows that the Collector of Customs had, on the above assumption of facts, no jurisdiction to make any order in respect of these. The fact that the Collector of Customs thought, in exercising his functions as a quasi-judicial authority, that the Sea Customs Act did apply cannot possibly affect this question.

It appears that before the Collector the petitioner did not seek to make the case which he now wants to make, *viz.*, that the contract for supply of the goods was made in all these cases before 1st November, 1954. Before the Collector the petitioner's case was that the contracts in all the cases had been concluded before 15th August, 1954. The Collector came to the conclusion that this case, *viz.*, that the contracts had been concluded before 15th August, 1954, had not been established. It was in that view that he made the orders of confiscation with an option to pay penalty instead. It seems probable that in the appeals before the Central Board of Revenue and the revisional applications before the Government of India also the petitioner's case was that the contracts had been concluded before 15th August, 1954, and the case that the contracts were concluded before 1st November, 1954, was not pleaded. The Member, Central Board of Revenue, in disposing of the appeals recorded his view that it was not in doubt that the goods in question were imported into Pondicherry at a time when a licence was required for their import and that the appellant did not have such a licence. In that view he affirmed the Collector's orders with a modification that the fine in lieu of confiscation be reduced. The Government of India also found no reason to interfere with the orders passed by the Central Board of Revenue.

These facts can however make no difference to the position in law that if in fact the importations were made on the basis of contracts concluded before 1st November, 1954, the Sea Customs Act would not apply and the Collector or the Central Board of Revenue would have no jurisdiction to make any order of confiscation or penalty. Where an authority whether judicial or quasi-judicial, has in law no jurisdiction to make an order the omission by a party to raise before the authority the relevant facts for deciding that question cannot clothe it with jurisdiction.

The substance of the matter is that the Collector assumed jurisdiction on the view that the Sea Customs Act applied to these cases: if the importations were on

1. L.R. (1910) 2 K.B. 859 at 880.

2. (1961) 1 S.C.R. 305.

the basis of contracts concluded before 1st November, 1954—as we have assumed—the Sea Customs Act does not however apply to these cases. Therefore, the Collector acted without jurisdiction and the fact that the assumption of jurisdiction was based on the Collector's wrong decision, does not change that position. The writ petitions would therefore be maintainable, if the petitioner can satisfy the Court that the importations were made on the basis of contracts concluded before 1st November, 1954. I would therefore reject the preliminary objection.

When the *Universal Imports Agency Case*¹, was decided by this Court, no objection to the maintainability of the writ petition was raised; and consequently the Court had not to consider the question whether the action taken by the Collector of Customs was with or without jurisdiction. So long as however the law as laid by the majority judgment in that case remains good law, we must hold that the Sea Customs Act would not apply to imports in these cases also if they were made on the basis of contracts concluded before 1st November, 1954, and as explained above, that in my opinion compels the conclusion that the Collector of Customs acted without jurisdiction, if the imports were on the basis of contracts concluded before 1st November, 1954.

It may be mentioned herein in this connection that S.K. Das, J., in his judgment in *Ujjam Bai's case*² referred to the decision of this Court in *Universal Imports Agency v. Chief Controller of Imports and Exports*³, as a case where a quasi-judicial authority has acted without jurisdiction. Kapur, J., has also referred to this case and said

“in any case, this is an instance of want of jurisdiction to tax transactions which the law excludes from the taxing powers of the authority levying the tax.”

Coming now to the merits of the petitions, I need only state that the materials that have been produced by the petitioner are by no means sufficient to establish the case that the contracts in these several cases were concluded before 1st November, 1954. Mr. Chatterjee prayed to the Court for an opportunity to adduce further documentary evidence to convince us of the truth of the petitioner's case on this point. I might perhaps have been inclined to grant this prayer. No useful purpose will however be served by my discussing that question, or the materials already on the record, as my learned brethren, having come to a conclusion that the preliminary objection should succeed, have not considered the merits of the petition.

The position is exactly similar in the other thirteen petitions filed by M/s. Pioneer Traders which were heard along with the petitions already discussed and my conclusion in regard to those petitions is also the same.

The Order of the Court was made by

Sirke, C.J.—In accordance with the judgment of the majority of the Court, the petitions are dismissed with costs. There will be one set of hearing costs.

V.S.

Petitions dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—S.J. IMAM, N. RAJAGOPALA AYYANGAR, AND J.R. MUDHOLKAR, JJ.

Shabir Hussain Bholu

.. *Appellant**

The State of Maharashtra

.. *Respondent.*

Criminal Procedure Code (V of 1893), section 479-A—Applicability—Defendant before Sessions Court at variance with that before Committing Magistrate—Sessions Judge not following procedure prescribed under section 479-A—Effect—Frivolous, based on procedure under sections 476 to 479 of the Code—Is maintainable.

The provisions of sections 476 to 479 of the Code of Criminal Procedure Code are totally excluded where an offence is of the kind specified in section 479-A.

1. (1961) 1 S.C.R. 305.

*Crl.A. No. 92 of 1951.

2. A.I.R. 1952 S.C. 1621.

28th September, 1962.

Parshotam Lal v. Madanlal, A.I.R. 1959 Punj 145 and *Amolak v. State*, A.I.R. 1961 Raj. 220 approved. *Durga Prasad Khosla v. The State of U.P.*, A.I.R. 1959 All. 744 ; *Lal Bihari v. State*, A.I.R. 1962 All. 251 ; *Jabir Singh v. Malkhan Singh*, A.I.R. 1958 All. 364 ; *Badullah v. State*, A.I.R. 1961 All. 397 and *State of Bombay v. Premdas Sukritdas Gadheval Koshti*, A.I.R. 1960 Bom. 483, overruled.

It cannot be said that in a trial with a jury the Sessions Judge can have no opportunity to record in his judgment a finding of the kind required by section 479-A (1) and give his reasons for that finding. It is necessary for him to record a short judgment either accepting or rejecting the verdict of the jury. In either case he gets an opportunity of recording the kind of finding which is required by section 479-A (1). For considering the applicability of section 479-A (1) what has to be borne in mind is that in a jury trial it is possible for the judge to come to a conclusion that the statement made at the trial is false. If he comes to that conclusion then he has no option but to proceed under section 479-A, Criminal Procedure Code.

Committal proceedings are a stage of the judicial proceedings before the Sessions Judge. Where false evidence is given before the committing Magistrate by a person who was later examined at the trial, the evidence given by him before the Committing Magistrate cannot properly be said to have been given in an independent proceeding. Even when the Session Judge is unable to say which of the two contradictory statements (that before the Committing Magistrate and that before the Sessions Court) is false or even where he is of opinion that the statement before the Committing Magistrate is false it is for him and him alone to act under section 479-A (1). Where the Sessions Judge has failed to follow the procedure laid down under section 479-A the prosecution cannot be sustained on the basis that the complaint was made after following the procedure laid down in sections 476 to 479 of the Code of Criminal Procedure.

Appeal by Special Leave from the Judgment and Order dated the 18th January, 1961, of the Bombay High Court in Criminal Revision Application No. 91 of 1961 (By State) Converted from Criminal Appeal No. 1131 of 1960.

Miss Kapila and Y. Kumar, Advocates, for Appellant.

D.R. Prem, Senior Advocate; *R. H. Dhebar* and *R. N. Sachthey*, Advocates, with him, for Respondent.

The Judgment of the Court was delivered by

Mudholkar, J.—In this appeal by Special Leave from the judgment of the Bombay High Court the question which arises for consideration is whether the Chief Presidency Magistrate, Bombay, could not take cognizance of a complaint against the appellant for an offence under section 193, Indian Penal Code, because the Additional Sessions Judge, Bombay, who filed that complaint had failed to follow the procedure laid down in section 479-A of the Code of Criminal Procedure.

The appellant was a witness for the prosecution at the trial of one Rafique Ahmed before the Additional Sessions Judge, Greater Bombay, for offences of murder and abetment of murder, along with two other persons. When the appellant had been examined as a witness before the Committing Magistrate he deposed that in his presence Rafique Ahmed had stabbed the deceased Chand while he was running away. When, however, he was examined at the trial before the Court of Sessions three months latter the appellant stated that while he was standing on the threshold of his house he saw Rafique Ahmed and his two associates coming from the direction of the Muhammadan burial ground. According to him one of them had a dagger while the others had only sticks with them. He, however, did not see anything more because, as his children were frightened, he closed the door and remained inside. He disclaimed knowledge of what happened subsequently and in cross-examination stated that it was not true that he actually saw Rafique Ahmed stabbing the deceased.

In his charge to the jury the learned Additional Sessions Judge who tried the case has brought out the fact that the appellant had made two widely divergent statements in regard to a certain part of the incident. The jury, after considering the entire evidence, returned a verdict of not guilty against Rafique Ahmed in respect of the offence under section 302, Indian Penal Code, but found him guilty under section 304, First Part. It also found the other two accused persons guilty under section 304, First Part read with section 109, Indian Penal Code. After the trial was over the learned Additional Sessions Judge came to the conclusion that proceedings should be taken against the appellant for intentionally giving false evidence. He, therefore, recorded a separate order which runs thus:

"I direct that the Registrar, Sessions Court for Greater Bombay should take necessary steps for prosecution of witness Shabir Hussein Bholu for the offence of perjury in view of his deposition before the Committing Magistrate and his deposition in this Court, both of which are on oath but are at variance with each other."

In pursuance of this order a notice was issued against the appellant requiring him to show cause why he should not be prosecuted under section 193, Indian Penal Code, for making contradictory statements regarding the same incident. In pursuance of that notice the appellant appeared before the Additional Sessions Judge and his counsel submitted that the contradictory statements were ascribable to the fact that the appellant was illiterate and that his mind was in a state of confusion. These contentions were rejected by the Additional Sessions Judge who made the notice absolute and ordered the complaint to be filed. Accordingly a complaint was filed under his signature before the Chief Presidency Magistrate, Bombay. The statements which were regarded by him as contradictory were also set out in that complaint.

At the trial of the appellant before the Chief Presidency Magistrate an objection was raised on his behalf that the provisions of section 479-A, Code of Criminal Procedure had not been complied with by the Additional Sessions Judge and that consequently the Chief Presidency Magistrate could not take cognizance of the offence. The objection was upheld by the Chief Presidency Magistrate and the appellant was ordered to be discharged. The State preferred an application for revision before the High Court which granted that application, set aside the discharge of the appellant and remanded the case for trial by the Chief Presidency Magistrate.

It may be mentioned that in its order the High Court has observed that though the provisions of section 479-A, Criminal Procedure Code had not been complied with it was still open to the Chief Presidency Magistrate to take action on the complaint under sections 476 to 479 of the Code of Criminal Procedure.

Chapter XXXV of the Code of Criminal Procedure deals with "Proceedings in case of certain offences affecting the administration of justice." Section 476 (1) provides that when any Civil Revenue or Criminal Court is of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence referred to in section 195 (1), clause (b) or (c) which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, if it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court and forward it to a Magistrate of the First Class having jurisdiction to deal with the case. The offences referred to in clauses (b) and (c) of sub-section (1) of section 195 are those under sections 193, 194 to 196, 199, 200, 205 to 211, 228, 463/471, 475 or 476, Indian Penal Code. By section 89 of Act XXVI of 1955, section 479-A was added in Chapter XXXV of the Code of Criminal Procedure. The heading of that section is "Procedure in certain cases of false evidence." This section provides that notwithstanding anything contained in sections 476 to 479, inclusive, when any Civil Revenue or Criminal Court is of opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial proceeding, or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding, and that, for the eradication of the evils of perjury and fabrication of false evidence and in the interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, at the time of the delivery of the judgment or final order disposing of such proceeding, record a finding to that effect stating its reasons therefor and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof in writing and forward it to a Magistrate of the First Class having jurisdiction to deal with the offence. Sub-section (6) of section 479-A provides that no proceedings shall be taken under sections 476 to 479, inclusive, for the prosecution of a person for giving or fabricating false evidence, if in respect of such a person proceedings may be taken under section 479-A. Thus bearing in mind the *non-obstante* clause at the commencement of section 479-A and the

provisions of sub-section (6) it would follow that only the provisions of sub-section (1) of section 479-A must be resorted to by the Court for the purpose of making a complaint against a person for intentionally giving false evidence or for intentionally fabricating false evidence at any stage of the proceeding before it. No doubt, Parliament when it enacted section 479-A did not amend clauses (b) and (c) of section 195 (1) of the Code of Criminal Procedure and section 193, Indian Penal Code, which makes giving false evidence in a judicial proceeding punishable, sections 194 and 195 which make giving or fabricating false evidence with intent to procuring the conviction of a person for committing certain offences punishable, and section 463 and section 467 which deal with offences of forgery and using forged documents as genuine, are still to be found in clauses (b) and (c) of sub-section (1) of section 195 Criminal Procedure Code. In view of this Mr. Prem who appears for the State contended that Parliament by not amending section 195 (1) clauses (b) and (c) has made it clear that the procedure to be followed in section 479-A is only an alternative procedure to be followed in what he calls "flagrant cases." In support of his argument he has relied on the decision in *Durga Prasad Khosla v. The State of U.P.*¹. In that case it was held that section 479-A was enacted to give additional power to the Court authorising it to deal speedily with the more flagrant or serious cases of intentionally giving false evidence or intentionally fabricating evidence in judicial proceedings. It was also held there that the intention of Parliament in enacting section 479-A was to deal with offences of perjury of a more serious type and that less serious type of offences which cannot be brought under the new provision will, therefore, have to be dealt with under section 476 of the Code of Criminal Procedure. The Court therefore, took the view that section 479-A Criminal Procedure Code has not impliedly repealed section 476 of the Code in respect of all cases of witness giving or fabricating false evidence in judicial proceedings and so the provisions of section 476 of the Code are still available for proceeding against witnesses whose cases cannot be brought under section 479-A for one reason or another. He also referred to the decision in *Lal Behari v. State*², where the same view was taken. The learned Judges who decided the case dissented from the view taken in *Jabir Singh v. Malkhan Singh*³ to the effect that section 479-A was a complete code in itself for dealing with all offences which fall within its ambit. Learned Counsel further relied on the decision in *Badullah v. State*⁴, where it was held that the provisions of sections 476 and 479-A are not co-extensive and section 479-A was added in Chapter XXXV with the intention of arming the Courts with another weapon with which to deal with the growing evil of perjury in a more effective manner. It may be mentioned, however, that in this case the question which arose for consideration was whether a Court was required to proceed against a witness under section 479-A where the evidence given by him before that Court was contradictory to the evidence given by that witness in a previous but separate judicial proceeding. As we shall show presently this case is distinguishable from the one before us. Learned Counsel then referred to the decision in *State of Bombay v. Premdas Sukritdas Gadheval Koshti*⁵, in which it was held that section 479-A does not contain an exhaustive and self contained procedure relating to all classes of perjury but only applies to a case where the Court acts *suo motu* at the time of declaring its judgment and records a finding that a person appearing before it as a witness had intentionally given false evidence or has intentionally fabricated false evidence. According to the Court, while section 479-A applies only to certain kinds of cases of giving false evidence, namely, serious, flagrant and patent cases of perjury where the Judge records a finding under section 479-A (1), section 476 applies to all other cases of false evidence where the judge has not recorded a finding under section 479-A (1). The conclusion arrived at by the Court was that sub-section (6) of section 479-A does not exclude cases of perjury from the operation of sections 476 to 479. On behalf of the appellant reliance was placed before us on the decision in *Parshotam Lal v. Madan Lal*⁶, where it was held

1. A.I.R. 1959 All. 744.
 2. A.I.R. 1962 All. 251.
 3. A.I.R. 1958 All. 364.

4. A.I.R. 1961 All. 397.
 5. A.I.R. 1960 Bom. 483.
 6. A.I.R. 1959 Punj. 145.

that the provisions of section 479-A override the provisions of sections 476 to 479 in so far as they relate to the giving of false evidence or fabricating false evidence by a person who gives evidence during the course of the judicial proceedings. It was pointed out in this case that this section was enacted for enabling the Courts to deal with the specified offences more expeditiously and effectively and that the provisions were meant to be fair to both sides, that is, to bring a criminal to book promptly and not to harass him after a long time. Reliance was also placed on the decision in *Amolak v. State*¹, where more or less the same view was taken and it was further pointed out that where a case is of a class which falls squarely within the ambit of section 479-A (1) of the Code, the provisions of section 476 to section 479 are inapplicable.

We cannot, said Miss Kapila, ignore the opening words of section 479-A or the provisions of sub-section (6) of section 479-A. The inevitable effect of these provisions is to exclude the provisions of sections 476 to 479 in respect of offences which are dealt with specifically in sub-section (1). Restricting ourselves to a case where the offence consists of intentionally giving false evidence "in any stage of judicial proceeding" it is no doubt true that as under section 476 it is the Court which disposes of such judicial proceeding which primarily has to act under section 479-A. There does not appear to be any real distinction between section 476 and section 479-A as to the Court which can take action. Under section 476 the action may proceed *suo motu* or on application while under section 479-A no application seems to be contemplated. But there is nothing in this provision which makes a distinction between flagrant offences and offences which are not flagrant or between serious offences and offences which are not serious. For exercising the powers conferred by this section the Court has in the first instance, to form an opinion that the person against whom complaint is to be lodged has committed one of the two categories of offences referred to therein. The second condition is that the Court has come to the conclusion that for the eradication of the evils of perjury and fabrication of false evidence and in the interests of justice it is expedient that a witness should be prosecuted for an offence which appears to have been committed by him. Having laid down these conditions section 479-A prescribes the procedure to be followed by the Court. If the Court does not form an opinion that the witness has given intentionally false evidence or intentionally fabricated false evidence no question of making a complaint can properly arise. Similarly where the Court has formed an opinion that though the witness has intentionally given false evidence or intentionally fabricated false evidence the nature of the perjury or fabrication committed by him is not such as to make it expedient in the interests of justice to make a complaint, it has discretion not to make a complaint. But it does not follow from this that it can later on resort to section 476 and make a complaint against the witness. For, even under section 476 the Court must, before making a complaint, be satisfied that it was expedient in the interests of justice to make an enquiry into the offence committed by the witness. It could not be urged that where the Court wilfully refuses to record at the time of delivering the judgment or final order disposing of the proceedings before it that for the eradication of the evil of perjury and in the interests of justice it was expedient that the witness should be prosecuted for the offence which appears to have been committed by him it could later resort to the provisions of section 476. The position must be the same where it fails to take action though it is open to it to do so. It is not as if, as the learned Counsel for the respondent suggests, that the Court has an option to proceed under either section 479-A or under section 476 and that if it does not take action under section 479-A it can do so under section 476. The jurisdiction of the Court to make a complaint against a person arises only from the fact that that person has given false evidence or fabricated false evidence at any stage of the proceeding disposed of by it. The conditions required to be fulfilled by the Court and the procedure to be followed by it for the purpose of exercising its jurisdiction and making a complaint are not to be equated with the conditions which give the Court jurisdiction to make a complaint. From

this it would follow that whereas section 476 is a general provision dealing with the procedure to be followed in respect of a variety of offences affecting the administration of justice, in so far as certain offences falling under sections 193 to 195 and section 471, Indian Penal Code are concerned the Court before which that person has appeared as a witness and which disposed of the case can alone making a complaint.

In our opinion, therefore, the view taken in the decisions relied upon by Mr. Prem is not correct and that the view taken in *Parshotam Lal's case*¹, and *Amolek's case*² to the effect that the provisions of section 476 to 479 are totally excluded where an offence is of the kind specified in section 479-A (1) is correct.

Mr. Prem then contended that there are two reasons why the provisions of section 479-A, Criminal Procedure Code, would not apply to the case before us. The first reason, according to him, is that the trial was held by the Additional Sessions Judge with the aid of jury and that consequently there can be no opportunity to the Additional Sessions Judge to record in his judgment a finding of the kind required by section 479-A (1) and give his reasons for that finding. The second ground is that the complaint made by the Additional Sessions Judge mentions that contradictory statements were made in the case, one before him and a different one before the Committing Magistrate. Where such is the case the only provision, according to Mr. Prem, under which a complaint could be lodged is that contained in section 476, Criminal Procedure Code.

As regards the first point it has to be borne in mind that though it is for the jury to give its verdict regarding the guilt or the innocence of the accused it is open to the Judge to accept or reject the verdict and, therefore, it is necessary for him to record a short judgment either accepting or rejecting the verdict. Where he rejects the verdict the law requires him to refer the case to the High Court under section 307, Criminal Procedure Code. In either case he gets an opportunity of recording the kind of finding which is required by section 479-A (1).

In so far as the second contention is concerned reliance is placed by Mr. Prem on *Badullah's case*³. There, as already stated, it was held that when contradictory statements are made in two different proceedings it cannot be predicated with certainty that the statement made in one of them is false unless of course there is sufficient material before the Court to come to a conclusion that the statement made before it is false so as to attract the application of section 479-A. It is also held there that when the Court is inclined to the opinion that the statement made in the previous separate judicial proceeding is false and the statement made before itself is likely to be true, the Court has no power to proceed under section 479-A. In his charge to the jury the learned Additional Sessions Judge placed before them the evidence given by the appellant at the trial and also the evidence of the appellant before the Committing Magistrate and asked them to decide whether to accept one or the other of the testimonies given by the appellant or whether to reject both. He also asked them to consider whether the reference made by the appellant to Chand, before the Committing Magistrate, was really to the deceased Abu Kana. The Jury, as already stated, returned the verdict of guilty under section 304, Part I. Of course, it cannot be said that the jury in arriving at the verdict placed reliance upon the evidence of the appellant tendered before the Court or rejected it. But it was open to the learned Additional Sessions Judge, after having accepted the verdict to say whether the evidence tendered at the trial was true or false. He has not chosen to do so. But, for considering the applicability of section 479-A (1) what has to be borne in mind is that in a jury trial it is possible for the Judge to come to a conclusion that the statement made at the trial is false. If he comes to that conclusion, then, as rightly observed in *Badullah's case*³, he has no option but to proceed under section 479-A (1), Criminal Procedure Code.

The question then is whether he could act under this provision if he is unable to form an opinion one way or the other as to whether the evidence tendered at

1. A.I.R. 1959 Punj. 145.

2. A.I.R. 1961 Raj. 220.

3. A.I.R. 1961 All. 397.

the trial is false or the evidence before the Committing Magistrate is false. What would be the position in such a case? If the proceedings before the Committing Magistrate must be held to be entirely separate proceedings then we agree with the Allahabad High Court that section 479-A (1) would not apply. Could that be said about evidence given at the committal stage? Now, section 479-A (1) speaks of false evidence given "in any stage of the judicial proceeding." The committal proceedings are a stage of the judicial proceedings before the Sessions Judge. It seems to us therefore that where false evidence is given before the Committing Magistrate by a person who was later examined at the trial, the evidence given by him before the Committing Magistrate cannot properly be said to have been given in an independent proceeding. The scheme of the Code is that before a person is tried for a grave offence by a Court of Sessions an enquiry is to be made by a Magistrate for finding out whether there is a *prima facie* case against the accused and if he finds that there is such a *prima facie* case to frame a charge against that person and commit him for trial before the Court of Sessions. No doubt, the evidence recorded before the Committing Magistrate is not deemed to be evidence recorded at the trial but the fact remains that the evidence recorded by the Committing Magistrate can be transferred in certain circumstances to the record of the trial and taken into consideration in the same way in which evidence tendered at the trial can be taken into consideration. In view of these features which characterise the commitment proceedings we are of opinion that those proceedings can be regarded as part of the same judicial proceeding which culminated in the decision of the Court of Sessions. Upon that view it would follow that even when the Sessions Judge is unable to say which of the two contradictory statements is false or even where he is of opinion that the statement before the Committing Magistrate is false it is for him and him alone to act under section 479-A (1). We, therefore, reject both the aforesaid contentions of Mr. Prem.

For these reasons we hold that the learned Chief Presidency Magistrate was right in discharging the appellant and that the High Court was in error in setting aside the order of discharge and directing the Chief Presidency Magistrate to proceed on the basis that the complaint was made after following the procedure laid down in sections 476 to 497, Code of Criminal Procedure.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—B.P. SINHA, *Chief Justice*, P.B. GAJENDRAGADKAR, K.N. WANGHOO, K.C. DAS GUPTA AND J.C. SHAH, JJ.

Anant Prasad Lakshminivas Ganeriwal

.. Appellant*

v.

The State of Andhra Pradesh and others

.. Respondents, etc.

Hyderabad Endowments Regulations, (1940)—Trust in Andhra Pradesh—Trust property in Madhya Pradesh and Trust registered under the M. P. Act (XXX of 1951)—Jurisdiction of Andhra Pradesh Legislature to enact laws in respect of the trust.

Part B States (Laws) Act, (1951), section 6—Repeal of the corresponding law—Extension of Charitable Endowments Act (VI of 1890) and Charitable and Religious Trusts Act (XIV of 1920)—Effect and extent of repeal.

Constitution of India, (1950), Article 14—State of Andhra Pradesh—Two laws in respect of religious endowments—Article 14, not violated—Article 19 (1) (f)—Hyderabad Endowments Regulations—Registration of Endowments—If offend Article 19 (1) (f).

Hyderabad Endowments Regulations, (1940)—Order removing the trustees in the instant case—Validity.

Where the trust is situate in a particular State, the law of that State will apply to the trust, even though any part of the trust property, whether large or small, is situate outside the State where the trust is situate.

The registration of the trust under the Madhya Pradesh Act cannot be a bar against the enforcement of the relevant provisions of the Hyderabad Regulations because even if it may be necessary for

the purpose of management of the property in Madhya Pradesh to register this trust also in Madhya Pradesh, that would not exclude the jurisdiction of the State of Andhra Pradesh to legislate with respect to this trust which is undoubtedly situate in Andhra Pradesh, though some property of the trust is in Madhya Pradesh.

Charitable Endowments Act (VI of 1890) definitely excludes religious public trusts from it. The Hyderabad Regulations deal with two kinds of trusts, namely, public religious trusts and trusts for purposes of charity and public utility. A public religious trust, is specifically excluded from the purview of Act (VI of 1890). Therefore, whatever may be the effect of Act (VI of 1890), on that part of the Regulations which deals with public trusts other than religious trusts, there is no doubt that the Regulations in so far as they apply to religious trusts, cannot be held to have been repealed by the application of Act (VI of 1890), to the then Part B State of Hyderabad, for the Regulations when they deal with religious trusts, would not be a law corresponding to Act (VI of 1890).

As to the Charitable and Religious Trusts Act (XIV of 1920), it certainly applies to religious trusts as well as other trusts of a charitable nature created for public purposes; but a perusal of section 3 of this Act would show that it is confined to a very limited purposes and that purpose is to give power to any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature to apply to the Court within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate to obtain an order directing the trustee to furnish the petitioner through the Court with particulars as to the nature and objects of the trust, and of the value, condition, management and application of the subject-matter of the trust, and of the income belonging thereto and also directing that the accounts of the trust shall be examined and audited. This is all that Act (XIV of 1920) is concerned with. The rest of the provisions of the Act are ancillary to the main provision contained in section 3. The Regulations on the other hand are a much wider enactment and provide, for the compilation of a book of endowment, for the management of the endowed property, for the duties of trustees, for possession over endowed property, and for the control of expenses from the income of the property. None of these matters is comprised in Act (XIV of 1920). Therefore, the application of Act (XIV of 1920) to the then Part B State of Hyderabad cannot be said to have repealed the Regulations by virtue of section 6 of the Part B States (Laws) Act, 1951.

The State of Andhra Pradesh, as it came into existence after the States Reorganisation Act, 1956, consists of two areas one of which came to that State from the former Part A State of Madras in 1953 and other from the former Part B State of Hyderabad in 1956. These two areas naturally had different laws.

In both parts of Andhra Pradesh there are laws with respect to public trusts of religious nature, though there may be some differences in detail in their provisions. The attack on the basis of violation of Article 14 must be repelled in the present case on the ground of 'geographical classification based on historical reasons.'

The provisions as to the compilation of book of endowments contained in sections 3 and 11 (except section 4 (b) of the Regulations) provide for registration of endowed property and for carrying out the objects of the Act, namely, that the intention of endower may be carried out and the duties of the trustee may be discharged conveniently and efficiently for the benefit of humanity. These Regulations are clearly reasonable restrictions in the interests of the general public within the meaning of Article 19 (5) of the Constitution and are conceived with the purpose of having correct information as to the endowments existing in the State so that their management may be carried out efficiently and for the benefit of humanity according to the terms of the endowments. These provisions thereof (except section 4 (b)) as to the registration of endowments are not in any way *ultra vires* the fundamental right enshrined in Article 19 (1) (f).

The orders cannot be justified under rules 67 and 68, under the Regulations for the reasons that (i) no inquiry was held, (ii) the orders were not passed by the Minister of Endowments, i.e., the Government and (iii) the removal in this case is for a reason which is not permissible therein. All that the Director of Endowments was entitled to do was to proceed to register the endowment, even if the trustee failed to appear in reply to that notice after making such inquiries as he thought proper and take such further action as may be justified by the other provisions of the Regulations. It was not open to him to pass the orders which amounted to removal of the trustee from trusteeship and taking over of the management of the trust by the Government. These orders must therefore be set aside as *ultra vires* the Regulations and the Rules assuming in the present case that the Regulations and the Rules providing for the removal of the trustee, are constitutional.

Appeal by Special Leave from the Judgment and Order dated the 18th March, 1960, of the Andhra Pradesh High Court in Writ Petition No. 358 of 1958. and petition under Article 32 of the Constitution for enforcement of Fundamental Rights.

N.C. Chatterjee, Senior Advocate (Alladi Kuppuswami, T. Rama Chandra Rao and Ganpat Rai, Advocates with him), for Appellant (In C.A. No. 140 of 1962) and the Petitioner (In Petition No. 86 of 1960).

P. Ramachandra Reddy, D.V. Sasstry, T.V.R. Tatachari and P.D. Menon, Advocates, for Respondents 1 and 2 (In both the matters).

The Judgment of the Court was delivered by

Wanchoo, J.—The appeal is by Special Leave from the order of the Andhra Pradesh High Court. The appellant has also filed a writ petition and as the two matters are connected, they will be dealt with together.

The appellant is Anant Prasad Lakshminivas Ganeriwai. He is also the petitioner in the writ petition and will hereafter be referred to as the appellant. The main respondents, who are also opposite parties in the writ petition, are the State of Andhra Pradesh and the Director of Endowments, Hyderabad. They will be referred to hereinafter as the respondents. The appellant claims to be the sole hereditary trustee and Mutwalli of the temple of Shri Sitaram Maharaj Sansthan and the subsidiary deity Shri Varadarajaswami, situate at Sitaram Bagh, in Hyderabad. In the earlier part of the nineteenth century, an ancestor of the appellant migrated to Hyderabad and carried on business there. He obviously prospered and in or about 1833 he built a temple at a cost of two lakhs of rupees and installed in it the idols of Shri Rama and other ancillary or subsidiary deities and consecrated the temple for public benefit and worship. In 1841, one Maharaja Chandulal, a Minister to the then Nizam, granted a jagir consisting of the villages of Akolee and Bordee in Berar for the upkeep and maintenance of the temple. Later, however, these villages were resumed by the Nizam and two other villages were granted instead to the temple. It appears that these two other villages were also resumed, and the village of Bulgaon was granted to the temple in 1850. It also appears that though village Akolee was resumed, the resumption order was not carried out and that village continued in the possession of the temple, so that since 1850 the temple has been in possession of the two villages for its upkeep and maintenance. In 1853, Berar was transferred to the British Government of India by the Nizam and these two villages therefore came under the administration of the Government of India. In 1859, some doubts arose about the title of the temple to the villages and there were enquiries under the Berar Inam Rules. Eventually, it was decided that the title of the temple was good and the villages had been assigned with the rest of Berar to the Government of India for administration and that they had been granted in jagir for a religious object and their devolution was governed by Rule IV of the Berar Inam Rules. Thereafter Inam Certificates were issued with respect to these two villages in the name of Ramlal, son of Hargopal, who was described as the Manager of the jagirdar, Shri Sitaramji Maharaj of Akolee and Bulgaon. The purpose of the jagir was mentioned as "for charitable expenses of temple of Shri Sitaram Maharaj situated in the Sitaram Bagh, at Hyderabad." In the twentieth century there was considerable litigation between the members of the family of the founder as to the right of management of the temple. Eventually it was decided in 1932 that Lakshminivas Ganeriwai, father of the appellant, was to be the manager of the jagirdar, and this decision was finally confirmed in 1933 by the Governor of the Central Provinces. The Government of Hyderabad was trying all along to find out how the income of this jagir was being spent. But it was decided that it was the Government of the Central Provinces alone which had the right to call for accounts of the villages and was responsible to see that the conditions of the grant were fulfilled and in 1941 this position seems to have been accepted by the Government of Hyderabad.

After the Constitution came into force from 26th January, 1950, the State of Madhya Pradesh took the place of the old Central Provinces and Berar. The State of Madhya Pradesh enacted a law known as the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, (I of 1951). In consequence of this law, the two villages were taken over by the State and statutory compensation was awarded. In addition, an annual cash grant of Rs. 8,470 was sanctioned by the State for the upkeep of the temple. Besides this grant, there was a large area of home farm land in the two villages, which was in the possession of the trustee for the benefit of the trust, and it is said that an income of Rs. 1,30,000 was being realised by the trustee from this home farm land. It further appears that there are hereditary pujaris and mahants of the temple, and these persons

had been complaining to various authorities in Hyderabad that Lakshminivas Ganeriwal was misappropriating temple funds on a large scale and neglecting his duties as a trustee and otherwise committing breaches of trust. In 1951, three of the hereditary pujaris filed a complaint before the Government of Hyderabad alleging various acts of mismanagement on the part of the trustee. This was inquired into by the Home Minister of the State of Hyderabad and he directed that the temple should be managed by a committee of five persons and this was said to have been done with the consent of Lakshminivas Ganeriwal. Later, however, Lakshminivas contended that he had never consented to the appointment of the committee, which would curtail his rights as hereditary trustee. Thereupon, the Home Minister directed the Director of Endowments to make a thorough inquiry into the matter. In the meantime, one of the hereditary pujaris filed a petition under section 3 of the Charitable and Religious Trusts Act (XIV of 1920) alleging various acts of mismanagement and praying for an order directing rendition of accounts, before the City Civil Court, Hyderabad. In March, 1956, the Court directed rendition of accounts and appointed an auditor to scrutinise them. The auditor went into the accounts and made a report showing several gross irregularities therein. In the meantime Lakshminivas Ganeriwal applied for the registration of the temple under the provisions of the Madhya Pradesh Public Trusts Act (XXX of 1951) and in June, 1955, the Registrar of Public Trusts directed the registration of Shri Sitaram Maharaj Sansthan, Sitaram Bagh, Hyderabad as a public trust under section 7 (1) of the Madhya Pradesh Act (XXX of 1951).

Hyderabad State also had a law for the purpose of providing for the proper administration of religious and public charities and for the due application of the income for the purpose of the trust. This law was known as the Hyderabad Endowments Regulations (hereinafter referred to as the Regulations) and it came into force in 1940. Section 2 thereof gives the definition of "endowment" as including "every transfer of property which any person may have made for religious purposes or for purposes of charity or public utility." It also provides for a "Book of Endowment" in which "all the estates or properties endowed" would be entered. Section 2 also defines a "trustee" as meaning a person appointed by the maker of the endowment for purposes of management of the property and fulfilment of the objects thereof. Sections 3 to 11 provide for the compilation of the Book of Endowment; section 12 for the management of the endowed property; section 13 for the duties of the trustee; section 14 for possession over endowed property; section 15 for expenditure from the income of endowed property; section 16 for framing of Rules; section 17 for appeals and section 18 for revision. It may be added that a large body of rules as many as 478 in number have been framed under the rule-making power conferred by the Act; and the Director of Endowments, Hyderabad, is given the power to enforce the Regulations and the Rules. In exercise of his power under the Regulations and the Rules, the Director of Endowments issued notice to Lakshminivas Ganeriwal on 12th September, 1957 to show cause within a fortnight from the date of the receipt of notice, why he should not be removed from the office of trustee of the temple and why the unauthorised trusteeship of the appellant should not be terminated, and six charges were levelled in this notice. Lakshminivas Ganeriwal replied to this notice on 17th September, 1957 and pointed out that he was no longer the trustee and that his son, the appellant, had been appointed the trustee under the Madhya Pradesh Act (XXX of 1951) by order of the Deputy Commissioner, Amravati, in November, 1956. He also denied the various charges levelled against him. On this reply, a notice was issued on 31st December, 1957, to the appellant to the effect that the temple had to be registered under the Regulations, and he was also warned that if he failed to take steps to get the endowment registered, the property would be taken over under the supervision of the Government and no more objection would be heard from him. The appellant objected to this notice on 1st February, 1958, and his main contention was that as the trust had been registered under the Madhya Pradesh Act (XXX of 1951), the endowment was not liable to be registered under the Regulations and the Rules framed thereunder,

and the State of Andhra Pradesh had no jurisdiction over the endowment and its property.

Soon after, the appellant filed a writ petition in the Andhra Pradesh High Court on 3rd February, 1958, challenging the notice dated 31st December, 1957, and the following contentions were raised on his behalf :—

(1) That by reason of the registration of the trust under section 7 (1) of the Madhya Pradesh Act (XXX of 1951), including the temple, the operation of the Regulations was excluded, as the registration under the Madhya Pradesh Act had become final ;

(2) That in any event, in applying the Regulations to the trust in question, the Courts should bear in mind the principle of comity of nations and refuse to interfere with the jurisdiction lawfully exercised by another State, namely, the State of Madhya Pradesh (now Bombay after the the States Reorganisation Act, 1956) ;

(3) That the Hyderabad Government had acquiesced in the control of the trust by the authorities in Berar and it was not open to it to repudiate that jurisdiction and claim to exercise the powers under the Regulations;

(4) That the Regulations were invalid inasmuch as they infringed the fundamental rights of the appellant under Articles 14 and 19 of the Constitution.

The High Court repelled these contentions and by its order dated 18th March, 1960, rejected the writ petition, thus upholding the validity of the notice dated 31st December, 1957. The appeal is from this order of the High Court by Special Leave.

After the High Court dismissed the writ petition, the Director of Endowments passed two orders. The first is dated 13th June, 1960, and it says that as the trustee had not cared to appear before him, even though the judgment of the High Court had been given about three months before, the Director considered in the interests of the institution, that the supervision should be taken over under rule 179 of the Endowments Rules. The second order was passed on 14th June, 1960, and it is stated that the temple with its buildings, etc. situate at Hyderabad, had been taken under the supervision of the Government of Andhra Pradesh and the management of the temple would vest in the Director of Endowments, Hyderabad, from the date of the order, namely, 14th June, 1960. The writ petition in this Court is directed against these two orders, and by it the appellant challenges the validity of the Regulations and the various Rules framed thereunder on the ground that they are repugnant to Articles 14 and 19 of the Constitution. In addition, it has been contended on behalf of the appellant that these orders are not justified even under the Regulations.

The State of Andhra Pradesh has opposed the petition, and it submits that the Director of Endowments waited till 13th June, 1960, after the dismissal of the writ petition in the High Court, for the appellant to appear in compliance with the notice dated 31st December, 1957, so that the endowment might be registered under the Regulations. As, however, the appellant did not appear in reply to the notice, and in view of the previous conduct of the trustees of this temple and the several complaints received against them and the evasion of the trustees even to disclose what the properties of the temple were, immediate action had to be taken under the Regulations and the Rules framed thereunder. Therefore, with a view to secure and preserve the trust property, immediate action was taken so that the property might not be secreted. It has also been contended that the Regulations and the Rules framed thereunder gave power to the State to take possession of the endowment and that the two orders were issued under the powers conferred under section 4 (b) and section 12 of the Regulations. It is also submitted that the Regulations and the Rules framed thereunder are not *ultra vires* in view of Articles 14 and 19 of the Constitution.

Learned Counsel for the appellant has submitted the following points for our consideration :—

(1) By reason of the registration of this trust, including the temple, under section 7 of the Madhya Pradesh Act (XXX of 1951), the operation of the Regulations is excluded ;

(2) The Regulations and the Rules framed thereunder are no longer in force as they must be deemed to have been repealed by the Part B States (Laws) Act (III of 1951) ;

(3) The Regulations and the Rules framed thereunder are repugnant to Article 14 ;

(4) The Regulations and the Rules framed thereunder are repugnant to Article 19 ;

(5) In any case, the orders passed on 13th and 14th June, 1960, cannot be supported under the Regulations.

It will be seen that the appeal is concerned only with the notice dated 31st December, 1957, while the writ petition attacks the two orders passed on 13th and 14th June, 1960. Though the attack on the notice as well as on the two orders is to a large extent common, we shall first deal with the attack on the notice dated 31st December, 1957, which is contained in the first four points raised on behalf of the appellant before us. The fifth point concerns only the two orders of June, 1960 and will be dealt with later.

Re. (1).

The contention of the appellant in this connection is that as the trust has been registered under the Madhya Pradesh Act (XXX of 1951), the Regulations cannot now be applied to it, and in any case the Regulations cannot affect property of the temple situate outside the State of Andhra Pradesh. We are of opinion that there is no force in this contention. It is true that the two villages (namely, Bulgaon and Akolee) are not situate within the State of Andhra Pradesh ; but it is not in dispute that the temple is situate within the State of Andhra Pradesh, and some property of the temple in the shape of shops, etc. besides the temple building itself, is situate in the State of Andhra Pradesh. Besides, it is common ground that offerings made by the pilgrims to the temple also constitute a part of its income, and that is received in Hyderabad. As such, we cannot see how the Regulations and the Rules framed thereunder would not apply to this temple, which is admittedly situate in an area to which the Regulations apply. A similar question came to be considered by this Court in *The State of Bihar v. Sm. Charusila Dasi*¹. In that case the temple was situate in Deogarh in the State of Bihar, though the major part of income yielding property endowed to the temple was situate in Calcutta. The question that arose for decision in that case was whether the Bihar law would apply to the temple and its properties. Section 3 of the Bihar Act made that Act applicable to all public religious and charitable institutions within the meaning of the definition clause in section 2 (1) of the Bihar Act, and the definition clause provided that the Act would apply to all religious trusts, whether created before or after the commencement of the Bihar Act, any part of the property of which was situate in the State of Bihar. It was held that—

“where the trust is situate in Bihar the State has legislative power over it and also over its trustees or their servants and agents who must be in Bihar to administer the trust, and as the object of the Act is to provide for the better administration of Hindu Religious Trusts in the State of Bihar and for the protection of properties appertaining thereto, in respect of the property belonging to the trust outside the State the aim is sought to be achieved by exercising control over the trustees *in personam*, and there is really no question of the Act having extra-territorial operation.”

It was further held that—

“the circumstance that the temples where the deities were installed are situate in Bihar and that the hospital and charitable dispensary are to be established in Bihar for the benefit of the Hindu public in Bihar, gives enough territorial connection to enable the Legislature of Bihar to make a law with respect to such trust.”

This decision in our opinion makes it abundantly clear that where the trust is situate in a particular State, the law of that State will apply to the trust, even though any part of the trust property, whether large or small, is situate outside the State where the trust is situate.

We may also refer to the *State of Bihar v. Bhabapritananda Ojha*¹, where a question was raised with respect to the application of the same Bihar Act to a trust situate in Bihar, but in the case of which a scheme had been framed by the District Judge of Burdwan and confirmed by the Calcutta High Court, at a time when the State of Bihar was part of Bengal before the partition of 1911. In that case, it was urged that the Bihar Act did not apply to the temple by reason of the fact that the temple and its properties were administered under a scheme made by the Court of the District Judge, Burdwan, and approved by the Calcutta High Court both of which were situate outside the territorial limits of Bihar, on the ground that the Bihar Act would otherwise by some of its provisions seek to interfere with the jurisdiction of Courts which were outside Bihar and thereby get extra-territorial operation. It was held in that case that it was competent to the Bihar Legislature to legislate in respect of religious trust situate in Bihar though some of the properties belonging to the trust might be outside Bihar. And it was further held that section 92 of the Code of Civil Procedure would no longer apply in view of section 4 (5) of the Bihar Act and consequently there was no question of extra-territorial operation, of the Bihar Act.

In the present case, the temple is situate in Hyderabad in the State of Andhra Pradesh. There is some property of the temple there, though the major part of the income yielding endowed property is situate outside in the State of Madhya Pradesh. In view therefore of the decision in *Sm. Charusila Dasi's case*², the Regulations will apply to this trust as the trust is situate in the State of Andhra Pradesh and the fact that some of the endowed properties are not in Andhra Pradesh would make no difference. Further the fact that the trust has been registered under the Madhya Pradesh Act (XXX of 1951) cannot exclude the operation of the Regulations in the case of this trust, for the trust is undoubtedly situate within the area where the Regulations are in force. A "public trust" has been defined in section 2 (4) of the Madhya Pradesh Act as meaning

"an express or constructive trust for a public, religious or charitable purpose and includes a temple, a math, a mosque, a church, a wakf or any other religious or charitable endowments and a society formed for a religious or charitable purpose."

Section 3 of the said Act provides that

"the Deputy Commissioner shall be registrar of public trusts in respect of every public trust the principal office or the principal place of business of which as declared in the application made under sub-section (3) of section 4 is situate in his district"

and he shall maintain a register of public trusts. Section 4 provides for the registration of public trusts. It is obvious that public trust as defined in section 2 (4) of the Madhya Pradesh Act (XXX of 1951) must be a public trust situate in the State of Madhya Pradesh. Even though section 2 (4) does not say so in terms, the definition must be confined to public trusts situate in Madhya Pradesh for the Madhya Pradesh Legislature could not, obviously did not intend to, legislate with respect to public trusts situate outside Madhya Pradesh. Therefore, section 2 (4) must be interpreted to apply only to public trusts situate in Madhya Pradesh. This conclusion is supported by section 3 which clearly shows that the Registrar would have jurisdiction in respect of a public trust within his District. As to where a public trust is situate has to be determined in accordance with the decision of this Court in *Sm. Charusila Dasi's case*², and on that view the public trust in this case must be situate in Andhra Pradesh and not in Madhya Pradesh where only some of the endowed trust properties are. In the circumstances the registration of the trust under the Madhya Pradesh Act cannot be a bar against the enforcement of the relevant provisions of the Hyderabad Regulations because even if it may be necessary for the purpose of

management of the property in Madhya Pradesh to register this trust also in Madhya Pradesh, that would not exclude the jurisdiction of the State of Andhra Pradesh to legislate with respect to this trust which is undoubtedly situate in Andhra Pradesh, though some property of the trust is in Madhya Pradesh. We therefore agree with the High Court that the trust in this case being situate in Andhra Pradesh, the Regulations will apply to it.

Re. (2).

The contention in this regard is that the Part B States (Laws) Act, 1951, applied certain Central Acts to the Part B States of Hyderabad, as it then was, from 1st April, 1951, and section 6 of this Act lays down that "if immediately before the appointed day, there is in force in any Part B State any law corresponding to any of the Acts or Ordinances now extended to that State, that shall, save as otherwise expressly provided in this Act stand repealed." A large number of Central Acts were applied to the Part B States, and reliance on behalf of the appellant is placed on two Acts in this connection to show that the Regulations have been repealed in consequence of the extension of those Acts, to the then Part B State of Hyderabad. These two Acts are, (i) The Charitable Endowments Act (VI of 1890), and (ii) The Charitable and Religious Trusts Act (XIV of 1920). It is urged that because of the application of these two Acts to the then Part B State of Hyderabad, the Regulations must be deemed to have been repealed in view of section 6 of this Act. We are of opinion that there is no force in this contention. Act (VI of 1890) definitely excludes religious public trusts from it. The Regulations deal with two kinds of trusts, namely, public religious trusts and trusts for purposes of charity and public utility. In the present case we are concerned with a public religious trust, which is specifically excluded from the purview of Act (VI of 1890). Therefore, whatever may be the effect of Act (VI of 1890), on that part of the Regulations which deals with public trusts other than religious trusts (on which we express no opinion, for we are here concerned with only religious trusts), there is no doubt that the Regulations in so far as they apply to religious trusts, cannot be held to have been repealed by the application of Act (VI of 1890), to the then Part B State of Hyderabad, for the Regulations when they deal with religious trusts, would not be a law corresponding to Act (VI of 1890).

As to Act (XIV of 1920), it certainly applies to religious trusts as well as other trusts of a charitable nature created for public purposes; but a perusal of section 3 of this Act would show that it is confined to a very limited purpose and that purpose is to give power to any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature to apply to the Court within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate to obtain an order directing the trustee to furnish the petitioner through the Court with particulars as to the nature and objects of the trust, and of the value, condition, management and application of the subject-matter of the trust, and of the income belonging thereto and also directing that the accounts of the trust shall be examined and audited. This is all that Act (XIV of 1920) is concerned with. The rest of the provisions of the Act are ancillary to the main provisions contained in section 3. The Regulations on the other hand are a much wider enactment and provide, as we have already indicated, for the compilation of a book of endowments, for the management of the endowed property, for the duties of trustees, for possession over endowed property, and for the control of expenses from the income of the property. None of these matters is comprised in Act (XIV of 1920). Therefore, the application of Act (XIV of 1920) to the then Part B State of Hyderabad cannot be said to have repealed the Regulations by virtue of section 6 of the Part B States (Laws) Act, 1951.

Re. (3).

The contention under this head is that there are two laws in force in two parts of the State of Andhra Pradesh with respect to religious endowments, and these two laws are different in many matters, and therefore there is discrimination,

which is hit by Article 14. The State of Andhra Pradesh, as it came into existence after the States Reorganisation Act, 1956, consists of two areas one of which came to that State from the former Part A State of Madras in 1953 and the other from the former Part B State of Hyderabad in 1956. These two areas naturally had different laws. We are told that steps are being taken to assimilate the laws in the two parts of the State and bring them under one common pattern. But that naturally takes time and complete assimilation of all laws has not yet taken place. We are further told that the question of having one law for public trusts of religious or charitable nature, is under the active consideration of the State Government. In these circumstances it would not be right to strike down all laws prevailing in the two parts of the State, because of certain difference in them arising out of historical reasons because the two areas in the State were formerly in two different States, namely, the former Part A State of Madras and the former Part B State of Hyderabad. Our attention in this connection has been drawn to *The State of Rajasthan v. Rao Manohar Singhji*¹. In that case a law relating to management of jagir estates which applied to only a part of Rajasthan was struck down on the ground that there was nothing corresponding to that law in other parts of Rajasthan, and the basis of the decision was that "there was no real and substantial distinction why the Jagirdars of a particular area should continue to be treated with inequality as compared with the Jagirdars in another area of Rajasthan". As against this, the respondents rely on *Bhaiyalal Shukla v. State of Madhya Pradesh*². In that case, the Sales Tax laws in different parts of the new State of Madhya Pradesh, which came into existence after the States Reorganisation Act, 1956, were different in some respects, because they were enacted by different Legislatures. Under section 119 of the States Reorganisation Act, all laws in force are to continue till repealed or altered by the appropriate Legislature. It was therefore held that different though parallel laws in different parts of Madhya Pradesh could be sustained on the ground that the differentiation arose from historical reasons, and a geographical classification based on historical reasons could be upheld as being not contrary to the equal protection clause in Article 14. We think the ratio of *Bhaiyalal Shukla's case*² applies in the present case and not the ratio of *Rao Manohar Singhji's case*¹. In the latter case, the Jagirdars of a particular area became singled out after the creation of the State of Rajasthan and management of their properties was taken away from them while the jagirdars of the rest of Rajasthan retained the management of their properties. It was in those circumstances when there was a pre-existing law in one part of Rajasthan to which there was nothing corresponding in the rest of Rajasthan that this Court held that the patent discrimination arising in that case was violative of Article 14. In *Bhaiyalal Shukla's case*², both parts had the same kind of law relating to sales tax, though there were some differences in their provisions. It was in these circumstances that parallel, though somewhat different, laws in two parts of the same State were upheld on the ground of "geographical classification based on historical reasons". The present case is similar to *Bhaiyalal Shukla's case*², for in both parts of Andhra Pradesh there are laws with respect to public trusts of religious nature though there may be some differences in detail in their provisions. Therefore, the attack on the basis of violation of Article 14 must be repelled in the present case on the authority of *Bhaiyalal Shukla's case*².

Re. (4).

This brings us to the question whether the Regulations are violative of Article 29 (1) (f) of the Constitution. We do not propose in the present case to examine the numerous rules that have been framed under the Regulations and shall confine ourselves to the *rites* of that part of the Regulations which is concerned with registration of endowments, and some of the rules in that behalf as the appeal is only concerned with registration. We have been told that some of the rules have been the target of attack in the former High Court of Hyderabad, and some of them have been struck down by that High Court (see *Narayan Pershad v. State of Hyderabad*³).

1. (1954) S.C.J. 439 : (1954) S.C.R. 996.

3. A.I.R. 1955 Hyd. 82.

2. (1954) 1 S.C.J. 241 : A.I.R. 1952 S.C. 931.

The sections with respect to registration are section 3 to section 11. Section 3 lays down that a book of endowments will be prepared containing all the endowments which are in force on the date of the Regulations or which will be brought into force in future. Section 4 (a) lays down that it will be the duty of every trustee or endower of an endowment to inform in writing with regard to an endowment the Director of Endowments concerned with respect to movable and immovable property of the endowment, and if there is a deed of endowment, submit the same or a certified copy thereof. Section 4 (b) lays down that if any trustee neglects to discharge his duties referred to in section 4 (a), he can be deprived of the benefit or consideration of the endowment wholly or partly which he possesses under the endowment. Section 5 lays down that any person may inform the Director of Endowments with regard to an endowment which has not been entered in the Book of Endowments. Section 6 gives power to the Director of Endowments to give notice for the registration of endowed property, howsoever he comes to know of it. Section 7 provides that if no objection is made within the time fixed in the notice, the endowed property shall be registered in case the endowment is found to be legal. Sections 8 and 9 provide for procedure for decision of objections where objections are filed. Section 10 provides that every person whose objections have been disallowed can file a suit for declaration in the civil Court within one year of the dismissal of his objections whereby his rights might be decided and entries in the Book of Endowments will then be governed by the decision of the civil Court. Section 10 further provides that no person who has not filed objections can file a civil suit. Section 11 provides for a presumption that entries made in the Book of Endowments are correct unless otherwise held by the civil Court.

It will be seen therefore that provisions as to the compilation of Book of Endowments contained in sections 3 to 11 (except section 4 (b)) provide for registration of endowed property and for carrying out the objects of the Act, namely, that the intention of endower may be carried out and the duties of the trustee may be discharged conveniently and efficiently for the benefit of humanity. These Regulations are clearly reasonable restrictions in the interests of the general public within the meaning of Article 19 (5) of the Constitution and are conceived with the purpose of having correct information as to the endowments existing in the State so that their management may be carried out efficiently and for the benefit of humanity according to the terms of the endowments. These provisions therefore (except section 4 (b)) as to the registration of endowments are not in any way *ultra vires* the fundamental right enshrined in Article 19 (1) (f). As to section 4 (b), we do not think it necessary to express any opinion in this case. Section 4 (b) is a kind of penalty on the trustee for neglecting to carry out the provisions of section 4 (a), and lays down that the trustee can be deprived of the benefit arising to him under the endowment. In the present case it is not the contention of the appellant that there is any benefit arising to him under the endowment and therefore section 4 (b) would have no application.

In this connection we may also refer to rule 25, which lays down that

"if any trustee does not derive any benefit or return from the endowment in accordance with rule 24, then in the event of non-discharge of duties he may be suspended from the post of trustee for a suitable period and the management will be carried on during this period by Government".

This rule is being attacked as going beyond the rule-making power conferred on the Government. We do not think it necessary in the present case to decide the *vires* of this rule, as the impugned action is not under this rule. We should not however be taken to have upheld the *vires* of this rule when we uphold the validity of the provisions relating to registration in the Regulations and the Rules. We therefore uphold the validity of the provisions relating to registration of endowments (except section 4 (b) on which we express no opinion) and the Rules framed thereunder (except rule 25 and rules consequential thereon on which also we express no opinion) to carry out these provisions under which notice was given to the appellant on 31st December, 1957. In view of our conclusions on these four points, the appeal must fail.

Re. (5).

This brings us to the consideration of the *vires* of the orders dated 13th and 14th June, 1960. The attack on these two orders is two-fold. In the first place, it is urged that if these orders fall within the powers conferred by the Regulations and the Rules made thereunder, they should be struck down, as the Regulations and the Rules framed thereunder by which the trustee is deprived of his right of management are *ultra vires* Article 19 (1) (f). In the second place it is urged that these orders which purport to have been passed under rule 179 are bad as rule 179 itself goes beyond the powers conferred on the rule-making authority under the Regulations and in any case are contrary to the Rules. We do not think it necessary in the present case to consider whether the Regulations and the Rules framed thereunder with respect to removing a trustee from the management of the trust are unconstitutional. We shall confine ourselves to the second part of the argument in this behalf and consider whether the Regulations give power for the removal of the trustee under any circumstances and if so whether the removal in this case has taken place as provided under the Regulations and the Rules framed thereunder. It cannot be doubted that the two orders taken together do amount to removal of the appellant from trusteeship.

The only provision which deals with the management of endowed property is to be found in section 12, which is as follows :—

“With regard to the management of the endowed property, the trustee will be generally competent to exercise the powers which have been conferred on him by the endower. But if any trustee is not found to be competent, then the Minister for Endowments may frame Rules and Regulations for the realisation of the objects of the endowment and for the better management of the same by which the trustee will be duly bound or he may appoint a Superintendent under the Rules.”

Analysis of this section shows that it consists of three parts. Under the first part, the trustee is competent to exercise the powers which have been conferred on him by the endower, thereby recognising the right of the trustee to manage the trust property according to the terms of the endowment. The second part lays down that

“if any trustee is not found to be competent, then the Minister for Endowments may frame Rules and Regulations for the realisation of the objects of the endowment and for the better management of the same by which the trustee will be duly bound”.

Here again the management clearly remains with the trustee and he is only subjected to control by means of Rules and Regulations framed for the better management of the particular trust under the orders of the Minister for Endowments. Then comes the third part of the section which gives power in the alternative to the Minister for Endowments in case of incompetence of the trustee to appoint a Superintendent under the Rules. A Superintendent is defined in section 2 as meaning a person appointed by Government for purposes of management. Thus the last part of section 12 gives power to Government to appoint a Superintendent for purposes of management. This necessarily implies that on the appointment of a Superintendent to manage the endowed property under section 12, the trustee is deprived of the management of the property, and in effect is removed from trusteeship. This interpretation of the last part of section 12 is supported by rules found under Chapters XLIII, XLIV and XLV. Chapter XLIII deals with “Superintendence by Government”, Chapter XLIV with “Direct Superintendence of Government” and Chapter XLV “with *muntazim* (manager)”. It may be added that in the definition in section 2, the word “*muntazim*” has been translated as “Superintendent” while in Chapter XLV that word has been translated as “Manager”. It is obvious that the Superintendent and the Manager are the same thing. Rule 177 provides that if the Government takes over the endowed buildings under its superintendence, it shall have power to arrange for direct superintendence or appoint any *muntazim* (Superintendent) or manage through any committee. Chapter XLIV then provides for direct superintendence by Government. Rule 182 in that Chapter shows that where direct superintendence is taken by Government the power of spending the recurring amounts as per the budget will be vested in the trustee in accordance with the powers possessed by him under these Rules and there is no removal of the trustee. It is only when a Superintendent is appointed under Chap-

ter XLV that he has all the powers of a trustee mentioned in Chapter XXXI (see rule 187). The two orders of 13th and 14th June, 1960, read together clearly show that even though they purport to be passed under rule 179, which refers to "Direct Superintendence by Government", the Government has gone further than provided in the rule when it decided to take over the management of the temple and vest the same in the Director of Endowments from 14th June, 1960, with the result that the appellant has been deprived of the management and in effect removed from trusteeship. We presume that consequent on this a Superintendent would be appointed. The last part of section 12 which provides for the appointment of a Superintendent under the Rules in effect provides also for the deprivation of the trustee of his right of management and thus results in his removal. Now rule 67 deals with the removal of trustees and has laid down six conditions which would justify the removal of a trustee. The last of these conditions lays down that if any trustee is not fit for trusteeship due to some reason other than those contained in the first five conditions he would be removed from the post of trustee. But this removal can only take place if the matter is inquired into by a competent officer. Thus rule 67 contemplates that no trustee shall be removed from trusteeship unless an inquiry is held by a competent officer. This obviously means that the trustee will be given an opportunity to show cause why he should not be removed from trusteeship and it is only after a proper inquiry that a trustee can be removed from trusteeship. This provision is in consonance with the language of section 12, where the words used are "if a trustee is not found to be competent". The use of the word "found" clearly shows that the Legislature intended that action under the second and third part of the section would only be taken after a proper inquiry. Further, rule 68 provides that the power of removal of a trustee will be vested in the Minister for Endowments. Thus after an inquiry has been made by a competent officer, it is only the Minister for Endowments, which in the present set-up means the Government, which can remove the trustee. We have already pointed out that we do not think it necessary in the present case to consider the question whether these provisions as to the removal of the trustee by Government can be upheld as constitutional. But assuming that these provisions are constitutional, the question that arises is whether the two orders passed on 13th and 14th June, 1960, which must be read together and in effect amount to removal of the appellant from trusteeship can be justified under the Regulations and the Rules. Clearly these two orders have been passed by the Member, Board of Revenue, while rule 68 contemplates that the trustee would be removed only by the Minister for Endowments, which in the present set-up, can only mean the Government. Further, rule 67 provides that a trustee cannot be removed from trusteeship unless an inquiry has been made by a competent officer. That means that notice has to be issued to the trustee to show cause why he should not be removed for reasons shown therein and it is only after an inquiry has been made and one of the six conditions provided in rule 67 is established that the trustee can be removed. In the present case no notice was ever issued to the appellant to show cause why he should not be removed from the trusteeship. It is true that in the notice dated 31st December, 1957, it was stated that in case the appellant failed to respond to the notice (which was with respect to registration of the endowed property) the case would be completed taking the property under the Government's supervision and no more objection would be heard thereafter. The consequence of non-appearance to such a notice is to be found in section 7 which provides that if no objection is filed the endowment would be registered and in section 10 (b) which deprives a person who does not appear to object in response to the notice of any right to file a suit as provided in section 10 (a). But there is nothing in rule 67 which gives power to the Government to remove a trustee simply because he fails to appear in reply to a notice asking him to register the endowed property. The six conditions mentioned in rule 67 are: (i) insanity, (ii) contraction of a contagious disease of a certain type, (iii) conviction by a criminal Court, (iv) going out of Hyderabad State without intimation for more than a month, (v) forsaking the religion with which the endowment is concerned, and (vi) unfitness for trusteeship due to some other reason. There is no

provision therefore for removal of a trustee, merely because he has not appeared in answer to a notice under section 6 of the Regulations for registration of the endowment. The orders therefore that were passed on 13th and 14th June, 1960, which must be read together, cannot be justified under rules 67 and 68, for the reasons that (i) no inquiry was held, (ii) the orders were not passed by the Minister of Endowments i.e., the Government and (iii) the removal in this case is for a reason which is not permissible therein. All that the Director of Endowments was entitled to do on the basis of the notice dated 31st December, 1957 was to proceed to register the endowment, even if the appellant failed to appear in reply to that notice after making such inquiries as he thought proper and take such further action as may be justified by the other provisions of the Regulations. But on the basis of that notice it was not open to him to pass the orders which he did on 13th and 14th June, 1960, which amounted to removal of the appellant from trusteeship and taking over of the management of the trust by the Government. These orders must therefore be set aside as *ultra vires* the Regulations and the Rules assuming in the present case that the Regulations and the Rules providing for the removal of the trustee, are constitutional.

We therefore dismiss the appeal with costs. The Writ Petition is allowed with costs and orders dated 13th and 14th June, 1960 are hereby set aside.

V.S.

————— *Appeal dismissed. Petition allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, K. SUBBA RAO, K. N. WANCHOO, J. C. SHAH AND N. RAJAGOPALA AYYANGAR. JJ.

The State of Punjab

.. *Appellant**

v.

Joginder Singh

.. *Respondent.*

Punjab Educational Service (Provincialised Cadre) Class III Rules, 1961, Rules 2 (d) and (e) and 3—If violative of the rights guaranteed by Articles 14 and 16 (1) of the Constitution of India (1950).

*By Majority—(Subba Rao and Shah, JJ., dissenting).—*The Pension Rules applicable to the teachers in the 'provincialised cadre' were distinct and different from the Pension Rules applicable to teachers in the State cadre. The *inter se* seniority of members of the State Cadre Service is determined by Rule 9 of the Punjab Educational Service (Provincialised Cadre) Class III Rules, 1961 and it is not possible to read Rule 9 as governing the *inter se* seniority between the "provincialised" and the State cadre employees, the crucial date for determining such seniority under Rule 9 being the date of confirmation in the service. There is no specific provision or term in the Government Order expressly providing an intention to integrate it with the existing States service. To apply to the unqualified teachers in the "provincialised" group the State Cadre Rules, particularly as regards promotion to the selection grade would have meant considerable hardship to them. The conclusion from the above analysis is that there was no complete integration of the two services by the order of the Government dated September 27, 1957 which came into effect from 1st October, 1957. It would therefore follow that there could be no basis for the submission that the "provincialised" teachers and the teachers in the State cadre formed the same class so as to enable a complaint to be made under Article 14 of the Constitution of India (1950), if they were treated differently.

The two services started dissimilarly and they continued dissimilarly and any dissimilarity in their treatment would not be a denial of equal opportunity, for it is common ground that within each group there is no denial of that freedom guaranteed by the two Articles (Article 14 and Article 16). On this view, it would follow that the impugned rules cannot be struck down as violative of the Constitution.

*Per Subba Rao and Shah, JJ. (dissenting).—*Once the District Board and Municipal Board School Teachers were taken over by the Government of Punjab and an amalgamated Educational Service was evolved any special provision relating to promotion, depending solely upon the service of recruitment and upon no other ground seriously affected the rights of the members of the "provincialised" cadre to promotion and infringed Article 16 (1) of the Constitution. It was open to the Government at the initial stage to give to the "Provincialised" cadre different terms and not to constitute them into a service with the same grade as the State cadre, but the Government did give the same terms to the "provincialised" teachers and it was not then open to the Government to make rules relating to promotion so as to discriminate between the "provincialised" teachers and the State Cadre teachers. The Rules in so far as they provide for differential treatment between

the members of the 'State Cadre' and the 'Provincial Cadre' in the matter of promotion to the higher scale must be regarded as invalid.

Appeal by Special Leave from the Judgment and Order dated the 3rd October, 1961 of the Punjab High Court, Chandigarh in Civil Writ Petition No. 1559 of 1960.

C. K. Daphtary, Solicitor-General of India, L. D. Kaushal, Additional Advocate-General for the State of Punjab and N. S. Bindra, Senior Advocate (R. H. Dhebar, Advocate, with them), for Appellant.

C. B. Agarwala, Senior Advocate (A. N. Goyal, Advocate, with him), for Respondent.

The Judgments of the Court were delivered by

Rajagopala Ayyangar, J. (on behalf of the majority).—This is an appeal by Special Leave against the Judgment of the High Court of Punjab dated 3rd October, 1961. That Judgment was rendered in a petition under Article 226 of the Constitution filed by the respondent—Joginder Singh and by their order allowing the said petition in part, the learned Judges struck down rule 2 (d) and (e) and a part of rule 3 of the Punjab Educational Service (Provincialised Cadre) Class III Rules, 1961, which for convenience we shall call the impugned Rules, on the ground that those clauses were violative of the rights guaranteed by Article 14 and Article 16 (1) of the Constitution.

Certain facts have to be stated in order to appreciate both the manner in which the question was raised as well as the decision of the learned Judges now under appeal.

The respondent was before the 1st October, 1957 working as a "Junior vernacular teacher" in a District Board High School in District Hoshiarpur. The points in controversy in this appeal turn on the precise changes which were effected in the status and conditions of service of teachers like the respondent employed in District Board and Municipal Board Schools by certain executive instructions issued by the Punjab Government in September, 1957 to take effect from 1st October, 1957, by reason of which these teachers became State employees, but before proceeding to the details of these changes, it would be convenient to set out the position and conditions of service of teachers employed in State schools which prevailed on that date.

At that date teachers in State employ were governed by Rules framed under Article 309 of the Constitution which had been promulgated on 30th May, 1957. These Rules were entitled "The Punjab Educational Service Class III School Cadre Rules, 1955". We shall have occasion to refer to these Rules in detail after narrating the facts which have given rise to the present appeal. For the present it is sufficient to state that these rules prescribed *inter alia* the qualification for appointment, the recruiting authority, the conditions of service and seniority *inter se* of members of the service. The Appendices to these rules specified the scales of salary to which teachers falling within the various grades which were specified would be entitled. The scales of pay of these State teachers were revised as a result of the acceptance by Government of the recommendation of a Committee for Pay Revision and under an order of Government dated 23rd July, 1957, "Junior teachers" in the State service, the class of officers with whom we are now concerned were split up into three grades: (a) Head Masters, (b) those in the middle scale, and (c) those in the lower scale. This Government Order fixed the percentages of the teachers to be comprised in each group. It would be seen that so far as Head Masters were concerned, there could be no definite number because that depended upon the number of schools in which they could function but for teachers other than Head Masters, i.e., in what has been termed "the junior teacher grade", 15 per cent. of the total strength of junior teachers were put in the "middle scale" on a salary scale of Rs. 120-5-175 and this percentage included the Head Masters also though they were on a still higher scale of salary, while the rest of the 85 per cent. were to be in the "lower scale" on a salary scale of Rs. 60-4-80-5-100-5-120. This Government Order further directed :

"Fifteen per cent. of teachers in this group should straightaway be promoted to the middle class by selection based on seniority and merit while the rest should be given the lower scale".

These were the rules governing the category called "Junior Teachers in the State Cadre" on 1st October, 1957.

By an executive instruction dated 27th September, 1957 (to be effective from 1st October, 1957), in the form of a communication from the Secretary to the Education Department of the State to the Public Instruction, a change was made in the terms and conditions of service of teachers in the District Board and Municipal Board Schools. It might be mentioned that the executive action was later ratified by legislation in 1959 which was to have retrospective effect from 1st October, 1957, but as nothing turns on the terms of this enactment relevant to the points in controversy before us, it is not necessary to make any further reference to it. As the decision of this appeal hinges on the proper construction and the legal effect of the "Provincialisation" effected by this executive direction, it would be necessary to scrutinize its terms with reference to the then existing state of circumstances in some detail. But to this we shall revert a little later, but will at the present stage be content to mention that under this order the schools theretofore run by Municipal Boards and District Boards in the Ambala and Jullundur Divisions were taken over by the Education Department of the Punjab Government with effect from 1st October, 1957. The teachers then employed in these schools were also taken over becoming State employees. The order recites that on the 1st of October, 1957 there were, in the class of "junior teachers" in the schools taken over with whom we are concerned, 20,709 teachers. Applying to them the same proportion of 15: 85 of "lower" and "middle" class which applied to junior teachers in the State Cadre dealt with in the Government Order dated 23rd July, 1957, 3,184 teachers were placed in the higher grade entitled to the higher emoluments and 17,525 in the "lower" grade drawing the minimum salary open to junior teachers. This order also stated generally that the junior teachers employed in Local Body Schools which were being "provincialised" would be given "the same grades of pay and other allowances as were given to their counterparts in Government employment".

It is in evidence that subsequent to 1st October, 1957 the Government had under consideration three questions :

- (1) whether the "provincialised" teachers had to be kept in a cadre separate and distinct from the cadre of teachers in the State cadre or whether the two cadres were to be integrated into one ;
- (2) if they were to be integrated, how their *inter se* seniority was to be determined ;
- (3) if they were not to be integrated, what was to be the relationship between the teachers in the two cadres and similar allied questions.

The conclusions which the Government arrived at were published and given effect in the form of a letter dated 27th January, 1960, from the Secretary to the Government, Punjab to the Director, Public Instruction, Punjab. Briefly stated, the decision was that the two cadres—of "provincialised" teachers and teachers in the State Cadre—were to be kept distinct, and principles were formulated according to which promotions in the two cadres from the lower to the middle grade were to be determined. It is the validity of the terms of this decision that is challenged in this appeal by the respondent. The decision and directions contained in it were given effect to in the case of all employees belonging to the "provincialised" schools and thereupon the respondent filed the petition under Article 226 impugning the constitutionality of this direction on various grounds. One of these grounds was that the direction contained in this communication dated 27th January, 1960 did not have any statutory force since the same was not and did not purport to be a rule framed under Article 309 of the Constitution. To obviate this objection the Government of the Punjab promulgated the Punjab Educational Service (Provincialised Cadre) Class III Rules, 1961 on 13th February, 1961. These Rules conformed to the formal requirements of Article 309 but were otherwise in the same

terms as and operated in the same manner and from the same date as the impugned directions of January, 1960. The petition by the respondent before the High Court was therefore converted into one challenging the constitutional validity of the Rules of February, 1961 instead of the Government Communication of January, 1960.

The arguments in support of the challenge to the validity of these Rules could briefly be formulated thus: On the provincialisation of District Board and the Municipal Board Schools on and from 1st October, 1957, all the teachers theretofore serving in these schools became the employees of the State. On the date when they attained this status there were teachers in schools run by the State who were governed by the Rules published in May, 1957 with the scales of pay and grades revised under the orders of the 23rd July, 1957. Whether or not the Government had the power to keep these "provincialised" teachers, in a separate category, the Government did not do so but by the orders that they passed on 27th September, 1957, they were granted the "same grades and scales of pay and other allowances" as those applying to the teachers in the then State Cadres. This necessarily implied a complete integration of the two cadres with the result that the two became a single class of teachers and thereafter the fact that the "provincialised" teachers had been previously employed in District Board or Municipal Board Schools and not in schools run by the State was merely of historical interest and carried no legal significance. Any later order of Government therefore which draw any distinction between the class of "provincialised" teachers and teachers in the State Cadre to the prejudice of the former was discriminatory and void under Article 14 of the Constitution. As all the schools as and from 1st October, 1957 were being run by State, all teachers employed in them, whatever their previous history, belonged to the same class, since they performed the same functions, were entitled to the same salaries and had as such to be governed by the same rules and conditions of service. On this basis it was urged that the impugned Rules discriminated against the "junior teachers" in the "provincialised" cadre in two ways: (1) as regards their right or opportunity to obtain promotions and proceed to the "middle" scale and (2) disparity in the Rules relating to pension. It was contended that the discrimination as regards promotions was violative of Article 16 (1) and that as regards pension on the broader ground of an irrational classification violating Article 14. The learned Judges of the High Court acceded to the prayer of the respondent as regards the first objection in these terms:

— "The 1961 Rules in so far as the same create two cadres of persons in the same service and in so far as the same create inequality of opportunity for promotion in between the two cadres by providing the formula of promotion are void rules and in particular those rules are No. 2, in so far as it relates to the definitions of the two cadres, and No. 3, in so far as it provides for the effect of two cadres on the matter of promotion in the same."

but they rejected that in respect of pension on being satisfied that Article 14 was not violated in that regard. It is from this judgment that the State has preferred this appeal with Special Leave.

This will be a convenient stage where we might summarise briefly the provisions of the impugned Rules and their impact on the right to promotion of the respondent and the other "junior teachers" of the "provincialised" service to which he belongs. Before however, doing so it is necessary to mention a preliminary objection that was taken to the hearing of appeal. Along with the respondent Joginder Singh there were three others who had filed similar petitions and sought the same relief. Writ Petitions Nos. 161 and 162 of 1961 were by "junior teachers" like the respondent, while Amrik Singh petitioner in the remaining petition (Petition No. 163 of 1961) was a Head Master among the "provincialised" teachers. All the four petitions were dealt with together and were disposed of by a common judgment so that relief accorded to Joginder Singh the respondent before us in Writ Application No. 1559 of 1960 was also granted to the other three petitioners. The State however has preferred no appeal against the orders in the other three petitions, and Mr. Agarwala, learned Counsel for the respondent, raises the contention that as the orders in the other three petitions have become final, any order

passed in this appeal at variance with the relief granted in the other three petitions would create inconsistent decrees in respect of the same matter and so we should dismiss the present appeal as incompetent. We, however, consider that this would not be the legal effect of any order passed by the Court in this appeal and that there is no merit in this objection as a bar to the hearing, of the appeal. In our opinion, the true position arising, if the present appeal by the State Government should succeed, would be that the finality of the orders passed in the other three Writ Petitions by the Punjab High Court would not be disturbed and that those three successful petitioners would be entitled to retain the advantages which they had secured by the decision in their favour not being challenged by an appeal being filed. That however would not help the present respondent who would be bound by our judgment in this appeal and besides, so far as the general law is concerned as applicable to everyone other than the three writ petitioners (who would be entitled to the benefit of decisions in their favours having attained finality), the law will be as laid down by this Court. We therefore overrule the preliminary objection.

The impugned Rules are entitled "Punjab Educational Service (Provincialised Cadre) Class III, Rules, 1961" and they were deemed to have come into force from 1st October, 1957, i.e., the date when the "provincialised" cadre was formed. Rule 2 contained the definitions and of these those relevant to the present context, which have been struck down by the High Court in their judgment under appeal are clauses (d) and (e) which respectively define the word "Service" as meaning "The Punjab Educational (Provincialised Cadre) Class III Service" and clause (e) defining 'State Cadre' as meaning "The Punjab Educational (State Service) Class III (School Cadre)." Rule 3 with which Part II headed 'Conditions of Service' starts is the one which is the most relevant for the points arising in this appeal.

It reads :

"3. *Number and character of posts* :—(1) The service shall comprise the posts shown in Appendix A but shall be a diminishing one. The number of posts in various cadres of the Service shall be regulated in the following manner :—

(i) All the posts created for any provincialised school subsequent to its being taken over by the Government, whether on account of its being upgraded to a higher standard, removal of congestion therein or for any other purpose shall not constitute a part of the Service but will be borne on the State Cadre or such other Educational State Service as may comprise similar posts at the time of their creation.

(ii) (a) All such posts of Headmasters as well as of Masters or Teachers, in selection grades of the Service, as were vacant on 1st October, 1957 shall continue to be borne on the Service but an equal number of posts in ordinary pay scales in the relevant cadres of the service falling vacant as a result of promotion to the posts of Headmasters, Masters and Teachers in the selection grade shall be transferred to the State Cadre.

(b) All such posts of Masters and Teachers, in ordinary pay scales of the Service, as were vacant on 1st October, 1957, shall be transferred to the State Cadre.

(iii) The posts in various cadres of the service falling vacant due to the normal incidence of promotions, retirements or any other cause subsequent to the date of provincialisation of local authority schools shall be adjusted in the following manner :—

(a) All vacant posts of masters as well as of Junior Teachers in the Service shall be separately split up into blocks of seven and six posts by rotation. All selection grade posts in the first six vacancies in each block of seven and first five vacancies in each block of six shall continue to be borne on the Service but an equal number of posts on ordinary pay-scales of Masters or Junior Teachers as the case may be, together with other vacancies in ordinary pay-scales in each block shall be transferred to the State Cadre. The last vacancy in each block shall be transferred to the State Cadre :

Provided that if the last vacancy in the block is not in the selection grade one other post in the selection grade from within that block shall be transferred to the State Cadre, and if adjustment within the same block is not possible it shall be made in the next following block but in no case in any block thereafter.

The other rules which have some materiality are rules 4, 5, 8 and 9 and we shall set out the relevant portions of these :

"4. *Liability to transfer* : Members of the Service who are borne on a state-wise cadre may be posted in any Government or provincialised school throughout the State and members of the Service

who are borne on district-wise cadre may be posted in any Government or provincialised school throughout that district....."

"5. Confirmation: Members of the Service who were confirmed prior to the provincialisation of local authority schools shall be deemed to have been confirmed in the Service :

"8. Method of Recruitment: (1) Posts in Selection grades left over after the transfer of posts to the State Cadre as specified in rule 3 shall be filled by promotions from lower grade of the cadre:

Provided that no member shall be promoted to selection grade of the Service unless he possesses the qualifications and experience as specified in Appendix 'B'.

The only thing to be noted in regard to the qualifications set out in the Appendix 'B' as regards "junior teachers" with whom alone we are concerned is that for appointment to the selection grade (Rs. 120/175) they were not required to be Matriculates this being a minimum qualification prescribed by the Rules under the State Cadre, but it was sufficient if they were "junior trained" or "junior basic trained" or "special certificate teachers" with five years teaching experience in which case they were eligible to be appointed to the "selection" grade.

"Rule 8 (2) All promotions, whether from one grade to another or from one class of service to another, shall be made on the basis of seniority-cum-merit and no person shall be entitled to claim promotion on the basis of seniority alone."

Rule 9 lays down how the *inter-se* seniority of members of the service shall be determined as on 1st October, 1957.

We shall briefly summarise the effect of these provisions on the class of "provincialised" teachers :

(1) They were treated as falling under a cadre separate and distinct from teachers in the State Cadre governed by the Rules promulgated on 30th May, 1957.
 (2) Though the proportion of selection grade teachers to the total strength, viz., 15:85 was the same in both the cadres, it operated differently as regards the members in the two services. This was due to the fact that the Government decided that the "provincialised" teachers were to be a diminishing class to become extinct in course of time, whereas a number equivalent to that which the provincial cadre lost was added to the State Cadre. When the provincialisation of Local Board and Municipal Board teachers was effected by the Government Order of 27th September, 1957, there were, as we have pointed out, 20,709 "junior teachers" of whom by applying the 15 per cent. rule, 31,84 were to be in "selection grade" drawing the higher salary, while the rest of the 17,525 were in the ordinary or the "lower" scale. The corresponding figures for the State Cadre teachers on the same day, i.e., 1st October, 1957, was 107 of whom 15 per cent. would have been in the selection grade. The "provincialised" cadre being marked out for extinction; there was to be no further recruitment to that cadre and became, so to speak, closed at one end. All vacancies arising by retirements, deaths etc in the provincialised cadre were to be replenished by direct recruitment to the State Cadre. The consequence of this would naturally be that the selection grade of 15 per cent. in the State Cadre would be progressively increasing in strength which was determined by the total cadre strength, while the selection grade in the "provincialised" cadre would be progressively decreasing in strength for converse reason. As the cadres were kept separate the result would be that those recruited to the State Cadre would have a progressively larger chance of getting into the "selection" grade of that cadre than the corresponding member of the "provincialised" service. Thus a member of the State cadre who possessed the minimum educational qualifications required for appointment to the selection grade and also the minimum service prescribed as qualification therefor stood a better chance of promotion to the selection grade than did a teacher of the "provincialised" cadre getting into the selection grade of his cadre. The rigour of this rule was, however, greatly tempered by the division into blocks under rule 3 itself by reason of which roughly 11/13 of the total vacancies in the selection grade were directed to be filled by "provincialised" teachers leaving only the balance for those in the State Cadre. It is the disparity

in the chances of promotion existing between the members of the State Cadre and the teachers in the "provincialised" cadre that has been held to be discriminatory and violative of Articles 14 and 16 (1) of the Constitution by the learned Judges of the High Court. The summary of the Rules that we have given earlier would show that this disparity has been caused (a) by the impugned rule treating the "provincialised" teachers as belonging to a cadre different and distinct from the teachers in the State Cadre and not providing for any *inter se* seniority as between the two groups, and (b) the "provincialised" cadre being a diminishing cadre to be extinguished in course of time, the State Cadre being selected for expansion and perpetuation by becoming the sole cadre in which recruitment for vacancies could take place. The reason why we are stating the position in this form is that though the learned Counsel for the respondent based his argument to sustain the plea of a violation of Articles 14 and 16 (1) on the "division" of the two services as distinct cadres whereas in law they were one and ought to have been so treated, the "provincialised" teachers could have had no complaint if theirs was not made a vanishing cadre, for if the two services had been kept distinct and the vacancies in each filled up so as to replace the loss in the strength of each cadre, there would have been no scope for any complaint of discrimination.

The main basis upon which the learned Judges of the High Court have rested their judgment is that the order dated 27th September, 1957, which was brought into force on 1st October, 1957, by which the teachers in the erstwhile District Board and Municipal Board Schools were "provincialised" and made State employees, effected a complete integration of these teachers with the then existing members of the State Educational Service governed by the Rules of 30th May, 1957. It would be manifest that unless this step were established there could be no basis for the contention that the impugned rules which proceed on the basis that the provincialised teachers, were not in the State Cadre violated Article 14 or Article 16 (1). The first step in the enquiry has therefore to be whether this order of 27th September, 1957, effected a complete integration between the two services. This question can, in our opinion, be solved not by hypothetical or theoretical considerations but by a careful examination of the terms of the order dated 27th September, 1957, with a view to find out whether such a result was intended to be or was brought about. The justification for this observation of ours is because of the line of argument addressed to us by learned Counsel for the respondent. He submitted that there might have been differences in the qualifications of persons entitled to be recruited as teachers in the erstwhile Board schools as compared to the qualifications to be possessed by or the machinery set up to recruit teachers in the State Cadre. When once the "provincialisation" took place, the argument ran, they became teachers employed directly by the State the schools in which they were formerly employed having been taken over by the State. Under the order dated 27th September, 1957, their pay-scales were rendered the same as those applicable to teachers in the State Cadre. Besides, they could be transferred to State schools and teachers in the State Cadre transferred to work in former Board schools i.e., there was complete interchangeability so far as posts were concerned. If, it was contended, they did the same work, drew the same pay as the teachers in the State Cadre and the members of the two Services were freely liable to transfer *inter se*, nothing more remained to effect a complete integration. In further reinforcement of this submission reliance was placed on a paragraph of the memorandum of 27th September, 1957, under which these teachers were taken over into State employ which ran :

"All the incumbents of the Local Body schools to be provincialised with effect from the 1st of October, 1957, will be given the same grades of pay and other allowances as are given to their counterparts already in government employ. Their pay will be fixed under the Rules and there will be no drop in their present emoluments."

and from all this it was urged that a complete integration of the two services was intended to be and was brought about from and after 1st October, 1957. Besides the above there was a subsidiary argument that consistently with Article 14 the State could not create or maintain two parallel services of employees for doing the same work but with differences either in their emoluments or in their conditions

of service. This however was on the basis that the submission about a complete integration having been effected was not acceptable, and so we shall consider this further argument later.

We shall now proceed to examine the primary contention, *viz.*, that there was a complete integration of the two Services by the Government Order which had effect from 1st October, 1957, and that it was the impugned rules which brought about a division of this united or unified service by the creation of two new cadres with differences between members of the Service based on no intelligible differentia which was violative of Article 14, and as the same adversely affected the chances of promotion of the "provincialised" group *vis-a-vis* the State Cadre teachers infringing Article 16 (1).

We do not find it possible to accede to the contention that the memorandum dated 27th September, 1957, integrated the "provincialised" teachers with the teachers governed by the Punjab (Educational Service) Class III School Cadre Rules, 1955. In the first place, it is conceded that the Rules as to pension applicable to the State Cadre employees are not applicable to the "provincialised" teachers. The Government framed Rules as regards the pension of the provincialised teachers in October, 1958, which were distinct and different from the Rules applicable to teachers in the State Cadre. A complaint was made on this score by the respondent in his petition before the High Court but the same was rejected and there has been no appeal from that portion of that order. It must also be pointed out that the pension of the State Cadre teachers is determined by para. 11 of the Class III School Cadre Rules, 1955, and it is common ground that the said provision does not govern the conditions and quantum of pension of the "provincialised" teachers.

(2) The *inter se* seniority of members of the State Cadre Service is determined by rule 9 of the Rules which contain elaborate provisions for its determination. The first paragraph of the rule runs :

"The seniority *inter se* of the members of the Service holding the same class of posts and in the same or identical grades of pay shall be determined by the dates of their confirmations in such posts."

We do not find it possible to read rule 9 as governing the *inter se* seniority between the "provincialised" and the State Cadre employees. The date of confirmation *in the Service* is the crucial date for determining such seniority under rule 9 and the order dated 27th September, 1957, cannot, by any stretch of language, be read as confirming all the provincialised teachers in the State Cadre on 1st October, 1957, on which date it is said they were brought into the service. In the normal and ordinary course it would be possible that teachers had been working in the erstwhile Board Schools on probation and they had not been confirmed in their appointments on 1st October, 1957, when they were taken over. It cannot be that all the teachers who had not even completed their probation were straightaway treated as confirmed in the State Cadre so as to permit a determination of their seniority *inter se* with members of the State Service.

(3) Notwithstanding the paragraph quoted earlier conferring on the "provincialised" teachers "the same grade of pay and allowances as are allowed to their counterparts already in Government service" there is no specific provision or term in the Government Order expressly pointing to an intention to integrate it with the existing State Service. On the other hand the very specification that the grades, of pay and allowances of the provincialised teachers would be the same as of the others is, to say the least, more consistent with the absence of an intention to integrate or if integration were intended, they would have the same pay and allowances by virtue thereof and no separate provision thereof would be necessary.

(4) It is an admitted fact that of the twenty thousand and odd teachers falling within this category nearly 12 or 13 thousand were unqualified in the sense that they had not even passed the Matriculation examination. To apply to them the State Cadre Rules particularly as regards promotion to the selection grade would have been considerable hardship to them and this is certainly a circumstance that has

to be borne in mind before drawing an inference that a complete integration was intended, or was brought about. In fact, as has already been pointed out, while in the case of the State Cadre teachers a minimum educational qualification of Matriculate with five years teaching experience is prescribed for appointment to the selection grade, the requirement as to being a Matriculate has been dispensed with in the impugned rules in the case of the "provincialised" cadre. The conclusion we reach from the above analysis is that by the Order, dated 27th September, 1957, which came into effect from 1st October, 1957, teachers in the erstwhile Board schools became employees of Government and were given the same scales and grades of pay as were applicable to their counterparts in the State Cadre, but except this equality of grade and pay there was nothing more that was contemplated or provided for by that order.

We consider therefore that there is force in the submissions made to us on behalf of the appellant that the determination of the precise status of the "provincialised" teachers and their relationship *vis-a-vis* the teachers in the State Cadre was the subject of consideration by the Government which resulted in the promulgation of the impugned Rules. In the document marked as Exhibit R. 1 which was in the nature of a memorandum explaining the impugned Rules, the State Government stated :

"Consequent upon the provincialisation of Local Bodies' Schools the staff working in such schools was taken over into Government Service. It was necessary to determine their seniority *vis-a-vis* the old Government staff. The following three alternatives with regard to the integration of the two services were considered :—

- (a) Grouping formula *i.e.*, counting of full service of the local body teachers for the determination of joint seniority list ;
- (b) Integration of the two services into a joint cadre on the basis of counting service of the local body teachers from the date of provincialisation on grade to grade and cadre to cadre basis ;
- (c) Keeping separate cadres of the provincialised staff and of the staff of the erstwhile Government schools."

The Government considered that the third alternative was the best to be followed in the interest of a sound educational policy and also in the interests of these very teachers and rule 3 of the impugned Rules which we have set out earlier was evolved in order to reconcile the conflicting and divergent interests of the two Services which it was decided should be kept apart.

Apart from questioning the validity of the impugned Rules we did not understand the respondent to deny that the Government had considered this problem in the manner set out between 1957 and January, 1960.

If, as we hold, there was no integration (and integration has no meaning unless it is complete, for there is no such thing as partial integration) either expressly or by necessary implication, it would follow that it was not the impugned Rules that created the two distinct cadres but that they existed independently of the Rules and the only charge that could be laid against the Rules in this respect was that they failed to effect an integration. There was some argument before the High Court that the mere existence of two Services with similar grades and scales of pay and almost similar other conditions of service was itself illegal as amounting to discrimination prohibited by Article 14. In the counter-affidavit which was filed by the State to the Writ Petition of the respondent it was stated that there were very wide differences in the qualifications possessed by the members of the two Services and great disparity in the methods of recruitment. There were minimum educational qualifications prescribed by the Educational Service Class III Rules, 1955, as well as the Rules as they stood as notified on 30th May, 1957, under which teachers in the State Cadre were recruited. Besides, they were recruited after interview by the Public Service Commission, but this was not the case in the Board Schools between which even there were very great variations both in the minimum qualifications to be possessed and in the methods of recruitment. In view of these differences the counter-affidavit by the State averred that the "provincialised" teachers and the State teachers could not be said to form the same class as to require identity of treatment. The facts stated in this respect were not controverted before the High Court by the res-

pondent and by those whose petitions were disposed of along with his and it was for this reason that Counsel for the respondent specifically abandoned before the High Court all argument about the differentiation of the two services *per se* not amounting to a discrimination within Article 14. The reasons therefore which underlay the abandonment of any argument regarding Article 14 would negative any submission that the recognition of the two Services as independent cadres was itself discriminatory, once the argument about their having been integrated by the Government Order of 27th September, 1959, be rejected. It would therefore follow that if the respondents cannot sustain their contention that the Order, dated 27th September, 1957, effected a complete integration of the two Services there could be no basis for the submission that the "provincialised" teachers and teachers in the State Cadre formed the same class so as to enable a complaint to be made under Article 14 if they were treated differently.

It now remains to consider a point which was raised that the State cannot constitute two Services consisting of employees doing the same work but with different scales of pay or subject to different conditions of service and that the constitution of such services would be violative of Article 14. Underlying this submission are two postulates : (1) equal work must receive equal pay, and (2) if there be equality in pay and work there have to be equal conditions of service. So far as the first proposition is concerned it has been definitely ruled out by this Court in *Kishori Mohanlal v. Union of India*¹. Das Gupta, J., speaking for the Court said :

"The only other contention raised is that there is discrimination between Class I and Class II Officers in as much as though they do the same kind of work their pay scales are different. This, it is said, violates Article 14 of the Constitution. If this contention had any validity, there could be no incremental scales of pay fixed dependent on the duration of an officers' service. The abstract doctrine of equal pay for equal work has nothing to do with Article 14. The contention that Article 14 of the Constitution has been violated, therefore, also fails."

The second also, is, in our opinion, unsound. If, for instance, an existing service is recruited on the basis of a certain qualification, the creation of another service for doing the same work, it might be in the same way but with better prospects of promotion cannot be said to be unconstitutional, and the fact that the Rules framed permit free transfers of personnel of the two groups to places held by the other would not make any difference. We are not basing this answer on any theory that if a Government servant enters into any contract regulating the conditions of his service he cannot call in aid the constitutional guarantees because he is bound by his contract. But this conclusion rests on different and wider public grounds, *viz.*, that the Government which is carrying on the administration has necessarily to have a choice in the constitution of the services to man the administration and that the limitations imposed by the Constitution are not such as to preclude the creation of such services. Besides, there might, for instance, be a temporary recruitment to meet an exigency or an emergency which is not expected to last for any appreciable period of time. To deny to the Government the power to recruit temporary staff drawing the same pay and doing the same work as other permanent incumbents within the cadre strength but governed by different rules and conditions of service, it might be including promotions, would be to impose restraints on the manner of administration which we believe was not intended by the Constitution. For the purpose of the decision of this appeal the question here discussed is rather academic but we are expressing ourselves on it in view of the arguments addressed to us.

Besides the disparity in the chances of promotion between teachers of the provincialised and the State Cadre created by rule 3 of the impugned Rules, the learned Judges of the High Court have held that there was a further disparity by reason of the teachers of the State Cadre being borne on a Divisional list, while under the Rules the *inter se* seniority and promotions of "provincialised" teachers was determined district-wise. It was pointed out by the learned Solicitor-General for the appellant that the State Cadre was kept on a Divisional basis because of the very

small number of the members of that Service, whereas it was found administratively inconvenient to have a similar geographical classification of members of the provincialised service and for that reason and no other, district-wise seniority, promotion and transfers was laid down for provincialised teachers. Learned Counsel for the respondent did not rely on this reasoning of the learned Judges of the High Court in deciding the case now under appeal. We therefore do not consider it necessary to make any further reference to it.

As we have stated already, the two services started as independent services. The qualifications prescribed for entry into each were different, the method of recruitment and the machinery for the same were also different and the general qualifications possessed by and large by the members of each class being different, they started as two distinct classes. If the Government Order of 27th September, 1957, did not integrate them into a single service, it would follow that the two remained as they started as two distinct services. If they were distinct services, there was no question of *inter se* seniority between members of the two services, nor of any comparison between the two in the matter of promotion for founding an argument based upon Article 14 or Article 16 (1). They started dissimilarly and they continued dissimilarly and any dissimilarity in their treatment would not be a denial of equal opportunity, for it is common ground that within each group there is no denial of that freedom guaranteed by the two Articles. The foundation therefore of the judgment of the learned Judges of the High Court that the impugned Rules created two classes out of what was formerly a single class and introduced elements of discrimination between the two, has no factual basis if, as we hold the Order of 27th September, 1957, did not effectuate a complete integration of the two services. On this view it would follow that the impugned Rules cannot be struck down as violative of the Constitution.

Before concluding it is necessary to point out that, as explained earlier, the source of the prejudice caused by the impugned Rules to the "provincialised" teachers lies not in the fact that the two cadres were kept separate but on account of the fact that the "provincialised" cadre was intended to be gradually extinguished. The real question for consideration would therefore be whether there was anything unconstitutional in the Government decision in the matter. In other words, had the respondent and his class any fundamental right to have their cadre strength maintained undiminished? This is capable of being answered only in the negative. If their cadre strength became diminished, the proportion thereof who could be in the grade, *viz.*, 15% of the total strength being predetermined, there must necessarily be a progressive reduction in the number of selection posts. In other words a mere reduction of the cadre strength would bring about that result and unless the respondent could establish that the Government were bound in law to fill up all vacancies in the provincialised cadre by fresh recruitment to that cadre and thus keep its strength at the level at which it was on 1st October, 1957, he should fail. It is manifest that such a contention is obviously untenable.

There could not be any dispute that the impugned Rules which enable vacancies in the selection grade of the State Cadre to be filled in part by teachers belonging to the "provincialised" service by the device of the block system greatly improves their position. The claim in the memorandum accompanying the impugned Rules Exhibit R-1 that the system has been framed so as to improve their conditions should therefore be considered to have some justification.

The appeal is accordingly allowed and the order of the High Court striking down rule 2 (d) and (e) and rule 3 in so far as it relates to promotions is set aside. In the peculiar circumstances of this case we consider that there should be no order as to costs in this appeal.

Shah, J. (for Subba Rao, J., and himself).—In this appeal the validity of the Punjab Government Notification No. 12832-ED-II-59/2935, dated 27th January, 1960, and the Rules framed under Article 309 of the Constitution by the Governor

of Punjab, on 13th February, 1961, in so far as they purport to prescribe a scheme for promotion of "provincialised" junior teachers to the selection grade is challenged.

On the reorganisation of the State of Punjab on 1st November, 1956, the Patiala and East Punjab States Union which was a Part 'B' State was merged with the State of Punjab, but for administrative purposes, in so far as it related to matters educational, the area was maintained as a separate division and the teachers serving in that region were maintained in a separate cadre. In this appeal we are not concerned with the rights and obligations of those teachers. On 23rd July, 1957, the Government of the State of Punjab issued a scheme of revision of scales of pay of low-paid public servants. By paragraph 3 which applied to employees in the Education Department it was directed that all teachers according to their qualification be placed in two broad categories—Category 'A' and Category 'B'. Teachers in Category 'B' were divided into three classes, Lower Rs. 60-4-80/5-100/5-120, Middle Rs. 120-5-175 and Upper Rs. 140-10-250. It was decided that "with a view to providing incentives, posts falling in these groups should be in the following percentages :—

"Group I—Lower scale.....85 per cent.

Middle scale.....15 per cent.

15 per cent of teachers in this group should straight away be promoted to the middle scale by selection, based on seniority and merit, while the rest should be given the lower scale."

We are not concerned with Group II and Group III in this appeal.

Before 1st October, 1957, in the State of Punjab (excluding the territory of the Patiala and East Punjab States Union which had merged with the State on Reorganisation of the States on 1st November, 1956) there were two sets of schools, schools maintained by the District and Municipal Boards and schools maintained by the State. On 27th September, 1957, the Government of the State of Punjab issued a Notification "provincialising" all District Board and Municipal Board schools with effect from 1st October, 1957, and took over the management of those schools. The number of schools to be taken over and the posts to be created in respect of the teaching and other staff in the various grades were set out in paragraph 2 of the Scheme. Out of the 'provincialised teachers' 3016 (J.V.S.J.T.s. and J.B.F.s. and others) were to be absorbed in the grade of Rs. 120-5-175 and 17123 in the grade of Rs. 60-4-80/5-100/5-120, and it was recited in the Notification that :

"all the incumbents of the Local Body Schools to be provincialised with effect from 1st October, 1957, will be given the same grades of pay and other allowances as are given to their counterparts already in Government employ. Their pay will be fixed under the rules and there will be no drop in their present emoluments."

The Government of Punjab thereafter appointed a Committee for framing Rules for fixing inter-State seniority of the 'provincialised teachers' and the State School teachers, the terms of pension and other allied matters. By letters dated 27th January, 1960, from the Secretary, Education Department, the Director of Public Instructions was informed that it had been decided, *inter alia*, that :

"the staff of provincialised schools and the erstwhile Government schools will be kept in separate cadres. All new entrants into service after the date of provincialisation will be deemed to have joined the ranks of the staff of erstwhile Government schools. The provincialised staff cadre would be a continuously diminishing cadre and would in course of time completely vanish leaving in the field only one cadre i.e., the cadre of Government staff. It is considered that this would ensure the same chances of promotion to the staff of erstwhile Government schools as existed before provincialisation whereas the provincialised staff would get the benefit of promotion to a large number of posts created directly as a result of provincialisation. There would be no administrative difficulty with regard to the transfers of teachers borne on both the cadres from one school to the other irrespective of the fact whether it is a provincialised school or a Government school, inasmuch as the two cadres would be separate only for the purpose of future promotions."

It was also stated that :

"the two separate cadres will be known as "State Cadre" and "Provincialised Cadre". All the vacancies arising out of the normal incidence of retirements, promotions etc., etc., in the Provincialised cadre, will be transferred to the State Cadre. In the State Cadre, the posts will be split up in the ratio of 15 (Rs. 250-300 and 250-350); 85 (Rs. 110-250) in the case of Anglo-Vernacular Teachers; and 15 (Rs. 140-220); 35 (Rs. 120-175) : 50 (Rs. 60-120) in the case of Vernacular staff. The number of posts in the higher grades released as a result of retirements, promotions etc..

in the Provincialised Cadre minus those created on the State Cadre will be utilised for the promotion of teachers on the Provincialised Cadre from lower to higher grades."

The respondent Jogendra Singh who was a District Board Junior Vernacular teacher addressed a memorandum to the Government of the State that the bifurcation of the junior vernacular teachers into two categories was "unnatural" and put the teachers from the "provincialised schools" to a great disadvantage and that the treatment being discriminatory "was wholly illegal, unreasonable and invalid and offended Article 14 of the Constitution". It was submitted that the scheme should not be introduced without promulgation by the Governor of the State of Punjab Rules under Article 309 of the Constitution. The respondent and others having failed to obtain any relief filed petitions under Article 226 of the Constitution being Petitions Nos. 1559 of 1960 and 61, 162 and 163 of 1961 for writs or orders or directions quashing the Punjab Government Notification No. 12832-ED-II-59/2935, dated 27th January, 1960.

Subsequent to the institution of the petitions the Governor of Punjab published Rules on 13th February, 1961, under Article 309 of the Constitution setting up a separate cadre of "provincialised" teachers and regulating conditions of service of the teaching staff taken over by the State Government from the Local Authorities consequent upon 'provincialisation' of the Board schools. Simultaneously with the publication of the Rules, a 'policy statement' explaining the reasons for setting up a distinct cadre, and the scheme for promotion to higher scale and other matters was also published. It was recited in the 'policy statement' that after considering three alternative schemes one of grouping, other of integration of the two services into a joint cadre and the third of keeping separate cadre of provincialised staff and the staff of the erstwhile Government schools, the following important 'policy decision' was taken by the Government—

"(i) The staff of the provincialised school and the erstwhile Government schools will be kept on separate cadres ;

(ii) All higher posts created on 1st October, 1957, directly due to the provincialisation of Local Body schools will be filled up by promotion from amongst the staff borne on the Provincialised Cadre ;

(iii) Provincialised Cadre will be a diminishing cadre and all future recruitment will be made on the State Cadre ;

(iv) All the vacancies arising out of the normal incidence of retirements, promotions, etc., in the 'Provincialised Cadre' will be transferred to the State Cadre * * * * *. The number of posts in the higher grades released as a result of retirements, promotions, etc., in the Provincialised Cadre minus those transferred to the State Cadre will be utilised for promotion in the 'Provincialised Cadre'.

In dealing with the Vernacular Junior teachers it was stated :

"There are the following two grades in this section and the posts were divided in the ratio of 15-85 (a) Rs. 120/175 : 15 per cent and (b) Rs. 60/120 : 85 per cent. Before a teacher is promoted from category (b) to (a), he/she must have at least five years' service to his/her credit."

By rule 2 (d) the expression 'service' was defined as meaning the Punjab Educational (Provincialised Cadre) Class III Service. 'State Cadre' was defined as meaning the Punjab Educational State Service, Class III (School Cadre). By rule 3 it was provided that the Service shall comprise the posts shown in the Appendix which shall be a diminishing cadre and the number of posts in various cadres of the Service shall be regulated in the manner set out therein. Sub-rule (1) (i) provided that all posts created for any 'provincialised' school subsequent to its being taken over by the Government shall not constitute a part of the Service but shall be borne on the State Cadre. By sub-rule (1), clause (iii) it was provided that the posts in various cadres of the Services falling vacant due to the normal incidence of promotions, retirements or any other cause subsequent to the date of "provincialisation" of local authority schools shall be adjusted in the manner detailed therein. Sub-rule (2) provided that all posts in the Service shall be borne on a State-wise Cadre except the posts of Vernacular and Classical Teachers, J.A.V. or J.S.T. Teachers and Junior Teachers which will be borne on District-wise Cadres.

After promulgating the Rules and the Policy Statement, the Government of Punjab filed their written statement to the petitions and contended, *inter alia*, that they were competent to take the decision even after 'provincialisation' with regard to the service conditions of the 'provincialised' staff; that all the service rules including rules of seniority did not become automatically applicable to the 'provincialised' staff on 1st October, 1957, and as the 'provincialised staff' formed a separate cadre for the purposes of promotion, there was reasonable classification and no discrimination between the State Cadre and the 'Provincialised' Cadre.

The High Court of Punjab rejected the plea raised by the State of Punjab and held that the teachers of the 'provincialised' cadre, and State Cadre were "Government servants of the same class" and the former were deprived by the Rules and the scheme equality of opportunity of promotion, and a discriminatory treatment was accorded to the 'provincialised staff' by keeping them in a separate cadre and treating recruitment to the vacancies occurring in the 'provincialised' cadre as in the State Cadre and at the same time maintaining a uniform ratio of 15 and 85 per cent between the teachers drawing higher scale and the lower scale salary. The High Court accordingly declared that the Rules of 1961 in so far as they created two cadres created inequality of opportunity for promotion in the 'Provincialised' Cadre and in particular rules 2 and 3 and to the extent stated above were void and inoperative against the petitioners. The Government of Punjab acquiesced in the order in three out of the four petitions, but for some reason which is not apparent on the record—and none is furnished by counsel for the State—filed an appeal only against the present respondent. That, however, is not a ground on which we may be justified in refusing to consider the appeal on the merits as submitted by counsel for the State.

It is undisputed that there were more than 20,000 teachers in the 'provincialised schools' out of whom 15 per cent were under the scheme of 'provincialisation' to be immediately posted in the higher scale and the remaining in the lower scale. In the State Service there were only 107 posts before 1st October, 1957. The State teachers, and the provincialised teachers were by the Rules and the Statement made in the policy decision formed into two separate cadres, though they were given the same grades of salary, performed the same duties, and were liable to be transferred so as to interchange their posts. The vice of the scheme lay in the provision that all the vacancies in the provincialised cadre were not to be filled by entrants to that cadre but new entrants were to be treated as entrants to the State Cadre. The practical effect of that provision was that the 'provincialised' cadre was a gradually diminishing cadre which would be extinguished in approximately about 30 years whereas the State Cadre was an expanding cadre. By maintaining the uniform ratio of 15 to 85 in both the cadres between the higher scale and the lower scale some teachers in the 'provincialised' cadre and in the lower scale were relegated to a perpetual state of remaining juniors even to new entrants in the State Cadre. This is manifest from a simple illustration. Assuming that 3 per cent of the total strength fall vacant at the end of each year on account of death, retirement, resignation and other causes, there would be approximately 630 vacancies in the first year of the operation of the scheme 630 new appointments would therefore be made in the State Cadre, in that year, and the 'Provincialised Cadre' would be reduced by that number. The State Cadre which consisted of 107 on 1st October, 1957, would on 1st October, 1958, be a cadre of 737 teachers, and because of the uniform ratio of 15 to 85 per cent in each cadre between the higher scale and the lower scale 15 per cent of 737 teachers would have to be placed in the State Cadre in the higher scale. That would mean that practically all the teachers in the State Cadre would be promoted to the higher scale at the end of the year irrespective of their seniority provided they satisfied the requirement of the rule relating to educational qualifications and the requisite qualifying length of service. Assuming that all the 107 teachers possessed those qualifications all the members of the old State Service

would be promoted to the higher scale. At the end of the year ending 30th September, 1959, the scheme would break down, because in the State Cadre there would be a total strength of 1,345 out of whom more than 201 would be in the higher scale. For that purpose more than a hundred would have to be promoted to the higher scale and the Government would have to draw upon the junior scale of the State Cadre who may not have satisfied the requirement as to the duration of service. If the condition of length of service is waived about 100 teachers who are new entrants in the State Service would be promoted to the higher scale, whereas a large number of 'provincialised' teachers would still continue to remain in the lower scale even though they would be many years senior to the new entrants and may otherwise have the requisite qualifications for promotion. That this would be the result of complying with the terms of the scheme, is not disputed by the Solicitor-General who appeared on behalf of the State.

Article 16 (1) of the Constitution provides :

"There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State."

This Court in dealing with the extent of protection of Article 16 (1) observed in *General Manager, S. Rly. and another v. Rangashari*¹ :

"It would be clear that matters relating to employment cannot be confined only to the initial matters prior to the act of employment. The narrow construction would confine the application of Article 16 (1) to the initial employment and nothing else ; but that clearly is only one of the matters relating to employment. The other matters relating to employment would inevitably be the provision as to the salary and periodical increments therein, terms as to leave, as to gratuity, as to pension and as to the age of superannuation. These are all matters relating to employment and they are, and must be, deemed to be included in the expression 'matters relating to employment' in Article 16 (1) * * *. What Article 16 (1) guarantees is equality of opportunity to all citizens in respect of all the matters relating to employment illustrated by us as well as to an appointment to any office as explained by us * * *. The three provisions (Article 16 (1), Article 14 and Article 15 (1)) form part of the same constitutional code of guarantees and supplement each other. If that be so, there would be no difficulty in holding that the matters relating to employment must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment.

Dealing with Article 16 (1) the Court observed :

"Article 16 (2) prohibits discrimination and thus assures the effective enforcement of the fundamental right of equality of opportunity guaranteed by Article 16 (1). The words, in respect of any employment used in Article 16 (2) must, therefore, include all matters relating to employment as specified in Article 16 (1). Therefore, we are satisfied that * * * promotion to selection posts is included both under Article 16 (1) and (2).

Ex facie, by the promulgation of the rule and the implementation of the scheme of promotion the fundamental right of the junior teachers in the 'Provincialised' Cadre and in the lower scale is infringed. But the Solicitor-General appearing on behalf of the State of Punjab contended that the 'Provincialised Cadre' was a newly created cadre, and it was open to the Government of the State to offer such terms of employment as they thought proper to the new entrants in the Service when the District Board and Municipal Board schools were 'provincialised'. The Government in exercise of their admitted right, said counsel, offered terms of service which though substantially similar to the terms by which the 'State Cadre' was governed, differed in two important respects (i) that the transfer of junior teachers was to be within the District and (ii) that the right of promotion was restricted in the manner prescribed, and the provincialised teachers having accepted those terms, they formed a separate grade with different terms of employment and they could not be deemed to belong to the same class as members of the State Cadre, and therefore the case of the respondent was one covered by the decision of this Court in *All India Station Masters' and Assistant Station Masters Association & others v. General Manager, C.R. and others*², and *Kishori Mohanlal Bakshi v. Union of India*³. Counsel relied upon the principle enunciated by this Court in *All India Station Masters' case*², that :

1. (1951) 2 S.C.J. 424; (1951) 2 M.L.J. (S.C.) 71; (1951) 2 An.W.R. (S.C.) 71; A.I.R. 1952 S.C. 35.

2. (1950) S.C.J. 314; (1950) 2 S.C.R. 311. A.I.R. 1952 S.C. 1139.

"the question of denial of equal opportunity required serious consideration only as between the members of the same class. The concept of equal opportunity in matters of employment, does not apply to variations in provisions as between members of different classes of employees under the State. Equality of opportunity in matters of employment can be predicted only between persons who are either seeking the same employment, or have obtained the same employment. Equality of opportunity in matters of promotion, must mean equality as between members of the same class of employee and not equality between members of separate, independent classes; and in *Kishori Mohanlal Bakshi's case*¹ that 'inequality of opportunity for promotion as between citizens holding different posts in the same grade may, therefore, be an infringement of Article 16'. That no such question can arise at all when the rules make the members of two grades eligible for promotion to different posts, there is in strict sense, no denial of equality of opportunity as among citizens holding posts of the same grade. As between citizens holding posts in different grades in Government service there can be no question of equality of opportunity and that Article 16 does not forbid the creation of different grades in the Government service."

The crucial point falling for determination in this case is whether the members of the 'Provincialised Cadre' belong to the same grade as the members of the 'State Cadre'. It is true that two separate cadres—the State Cadre, and the Provincialised Cadre—were formed by the Government, but in our judgment the division into two cadres was not decisive of the question whether there was denial of equal opportunity. The same scales of remuneration were paid to members of both the cadres. They performed the same duties and functions and held the same posts. Posts occupied by State Cadre teachers could be occupied by the 'Provincialised' school teachers and *vice versa*. It is admitted in the letter dated 27th January, 1960, addressed by the Secretary to the Government of Punjab, Education Department to the Director of Public Instructions, which formed the basis of the setting up of the two cadres, that the two cadres were *separate only for the purposes of future promotion*. We are in the circumstances unable to hold that between the members of the State Cadre and the 'Provincialised' Cadre there was any valid basis for classification so as to justify a differential treatment between their members *inter se* for the purposes of promotion without infringing the constitutional guarantee of equality of opportunity in the matter of employment. In the *All India Station Masters' case*² there were two distinct classes of Railway employees, Roadside Station Masters and Guards. These two classes of employees performed distinct duties: each class had separate rules fixing the number of personnel of each class, posts to which the men in that class will be appointed, question of seniority, pay of different posts, the manner in which promotion will be effected from the lower grades of pay to the higher grades. It was the view of the Court that they could be reasonably considered to be separate classes each in many matters an independent entity with its own rules of recruitment, pay and prospects and other conditions of service varying considerably from another.

In *Kishori Mohanlal Bakshi's case*¹, the Income-tax services were reconstituted. One of the features of the reconstitution was that in place of a single class of Income-tax Officers, two classes came into existence, one consisting of Income-tax Officers of Class I Service and the other class in which all the then existing Income-tax Officers were placed forming the Class II Officers. Class I Officers were eligible to be promoted to the higher posts of Commissioners and Assistant Commissioners. Class II Officers were not however eligible to be directly promoted to the higher posts. A percentage of the vacancies in the posts of Class I Officers was to be filled by promotion of Class II Officers and the rest by direct recruitment. The two classes of Officers did undoubtedly perform the same kind of work but their pay scales were different. The Court on those facts held that there was no denial of equal opportunity among citizens holding posts of the same grade. In the present case, it cannot be said that the grades of the 'Provincialised' teachers and the State Cadre were different. It may be true that in some cases, a lower degree of efficiency may have been insisted upon at the time of recruitment to the service which ultimately became the 'Provincialised' Cadre. But once the District Board and Municipal Board school teachers were taken over by the Government of Punjab and an amalgamated Educational Service was evolved, any special provision relating to promotion depending solely upon the source of recruitment and upon no other ground seriously

1. A.I.R. 1962 S.C. 1139.

2. (1960) S.C.J. 344 : (1960) 2 S.C.R. 311.

affected the rights of the members of the 'Provincialised' Cadre to promotion, and infringing Article 16, clause (1) of the Constitution. It may be noticed that for promotion to the higher grade the conditions in respect of both the State Cadre and the 'Provincialised' Cadre are the same namely that the teacher must be a Matriculate and must have put in service for five years in the Education Department. Therefore persons not possessing the prescribed educational qualifications admitted to the District Board and Municipal Boards as teachers will have no right to promotion.

It was submitted on behalf of the State that it was open to the Government to give to the members of the 'Provincialised' Cadre such terms as they thought proper and the Government was not bound to give the 'Provincialised' Cadre the same grades as were in fact given and therefore it was not open to the members of the 'Provincialised' Cadre to raise a dispute about the validity of the provisions relating to promotions. But if the Government in fact gave the same terms of employment and have in effect constituted a single grade of teachers, 'State and Provincialised' any discrimination between the members of that grade based on the source of recruitment so as to treat persons who have subsequently entered the service differently would clearly infringe Article 16 (1) and (2). It was doubtless open to the Government at the initial stage to give to the 'Provincialised' Cadre different terms and not to constitute them into a service with the same grade as the State Cadre, but the Government did give the same terms to the 'Provincialised' teachers, and it was not then open to the Government to make Rules relating to promotion so as to discriminate between the 'Provincialised' teachers and the State Cadre teachers.

It was also suggested that if the Government had treated all the teachers equally, the teachers who were absorbed from the Pepsu region would have taken precedence over the 'Provincialised' teachers and the members of the 'Provincialised' Cadre would not have even the slender chance of promotion to which they are entitled under the present scheme. It is unnecessary to consider as to what would have happened under a different scheme if adopted by the Government. It is common ground that the teachers who were absorbed from the Pepsu region were formed into a separate Cadre, distinctive character of which has been maintained. We are concerned in this case with the 'State' teachers and the 'Provincialised' teachers under the scheme which came into effect on 1st October, 1957, and in that scheme teachers absorbed from the Pepsu region have not been integrated. It is problematical whether 'Provincialised' teachers would have stood to gain by being integrated into a common service with the teachers in the Pepsu region. That is a question which does not fall to be determined in this appeal.

Finally, it was contended that the Rules having been given retrospective operation from 1st October, 1957, it was open to the Government to accord to the new entrants such terms as the Government thought proper and thereby no right of the new entrants was infringed. But it cannot be forgotten that in the first instance Government of the State admitted the 'Provincialised' teachers into a single unit of employment and thereafter by retrospective provision they have sought to provide a differential treatment between the two sections constituting one unit. It is against this differential treatment that the protection of Article 16 is claimed and in our judgment avails.

In our view the High Court was right in holding that the rule in so far as they provide for differential treatment between the members of the 'State Cadre' and the 'Provincialised Cadre' in the matter of promotion to the higher scale must be regarded as invalid. The appeal must therefore fail.

ORDER OF THE COURT :—In view of the opinion of the majority, the appeal is allowed and the order of the High Court striking down rule 2 (d) and (e) and rule 3 in so far as it relates to promotions is set aside. There will be no order as to costs in this appeal.

K.L.B.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. L. KAPUR, M. Hidayatullah AND J. C. SHAH, JJ.

Messrs. New India Sugar Mills, Ltd.

.. Appellant*

v.

The Commissioner of Sales Tax, Bihar

.. Respondent.

Bihar Sales Tax Act (XIX of 1947)—Sugar despatched by assessee to State of Madras on the directions of the Sugar Controller—Not a 'sale' within the meaning of the Sale of Goods Act (III of 1930)—No sales tax leviable.*Interpretation of Statutes*—Words used in an enactment—Meaning consistent with the object of the Act to be given.

The expression "sale of goods" has to be understood in the sense in which it is used in the Sale of Goods Act, 1930.

According to section 4 of the Sale of Goods Act to constitute a sale of goods, property in goods must be transferred from the seller to the buyer under a contract of sale. A contract of sale between the parties is therefore a pre-requisite to a sale. The transactions of despatches of sugar by the assessee pursuant to the directions of the Controller were not the result of any such contract of sale. It is common ground that the Province of Madras intimated its requirements of sugar to the Controller, and the Controller called upon the manufacturing units to supply the whole or part of the requirement to the Province. In calling upon the manufacturing units to supply sugar, the Controller did not act as an agent of the State to purchase goods; he acted in exercise of his statutory authority. There was manifestly no offer to purchase sugar by the Province, and no acceptance of any offer by the manufacturer. The manufacturer was under the Control Order left with no volition; he could not decline to carry out the order; if he did so he was liable to be punished for breach of the order and his goods were liable to be forfeited. The Government of the Province and the manufacturer had no opportunity to negotiate; and sugar was despatched pursuant to the direction of the Controller and not in acceptance of any offer by the Government.

The intimation of order of the Controller, and compliance therewith by the assessee did not result in any sale of goods in favour of the State of Madras. The action on the part of the assessee in despatching the goods was not voluntary; they were compelled to send the goods. They could not be deemed by despatching sugar to have made an offer to supply goods and in the absence of any offer, no contract resulted by the acceptance of goods by the Provincial Government. To infer a contract from the compulsory delivery of sugar and acceptance thereof would be to ignore the true position of the parties, and the circumstances in which goods were delivered.

If the Bihar Legislature had under the Government of India Act, 1935, no power to legislate in respect of taxation of transactions other than those of sale of goods as understood in the Sale of Goods Act, a transaction to be liable to pay sales tax had to conform to the requirements of the Sale of Goods Act, 1930. Attributing a literal meaning to the words used, *viz.*, "sale of goods" would amount to imputing to the Legislature an intention deliberately to transgress the restrictions imposed by the Constitution Act upon the Provincial Legislative Authority.

It is a recognised rule of interpretation of statutes that the expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning, as well as a popular meaning the Court would be justified in assuming that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its powers invalid. If the narrow and technical concept of sale is discarded and it be assumed that the Legislature sought to use the expression sale in a wider sense as including transactions in which property was transferred for consideration from one person to another without any previous contract of sale, it would be attributing to the Legislature an intention to enact a legislation beyond its competence. In interpreting a statute the Court cannot ignore its aim and object.

The intimation by the Province of Madras of its requirements did not amount to an offer, and the supply of goods pursuant thereto could not amount to a sale; consequently liability to pay sales tax under the Bihar Sales Tax Act on the amount received by the assessee from the Government of Madras for sugar supplied did not arise.

Per Hidayatullah, J.—The entry in No. 48 of List II, Seventh Schedule of the Constitution dealt with sale of goods in all its forms.

The entry should be interpreted in a liberal spirit and not cut down by narrow technical considerations. The entry in other words should not be shorn of all its content to leave a mere husk of legislative power. For the purposes of legislation such as on sales tax it is only necessary to see whether there is a sale express or implied. Such a sale was not found in "forward" contracts and in respect of materials used in building contracts. But the same cannot be said of all situations.

The entry has its meaning and within its meaning there is a plenary power. If a sale express or implied is found to exist then the tax must follow. In the transactions in question in the instant case there was a sale of sugar for a price and the tax was payable.

Appeal by Special Leave from the Judgment and Order dated the 30th September, 1958, of the High Court in M.J.C. No. 5 of 1956.

S. T. Desai, Senior Advocate, (*B. P. Maheshwari*, Advocate, with him), for Appellant.

S. P. Varma, Advocate, for Respondent.

The Court delivered the following judgments.

Shah, J. (for Kapur, J. and himself) :—Messrs. New India Sugar Mills, Ltd., hereinafter called ‘the assessee’—own a factory at Hasanpur in the State of Bihar. During the assessment period 1st April, 1947 to 31st March, 1948, the assessee who were registered as dealers under the relevant Sales Tax Acts despatched sugar valued at Rs. 6,89,482 to the authorised agents of the State of Madras in compliance with the directions issued by the Controller exercising powers under the Sugar and Sugar Products Control Order, 1946. The Sales Tax Officer, Darbhanga rejected the plea of the assessee that despatches of sugar to the Province of Madras in compliance with the instructions of the Controller were not liable to be included in the taxable turnover, and ordered the assessee to pay sales tax on a taxable turnover of Rs. 27,62,226. The order of assessment was confirmed by the Deputy Commissioner, but the Board of Revenue exercising jurisdiction in revision set aside the order, in so far as it related to the inclusion into the taxable turnover the value of sugar despatched to the Province of Madras. The Board of Revenue observed that the “Controller passed orders in exercise of statutory powers which, as a result of mere compliance, could not create a contract in law”, and there was no evidence justifying the view that there would “possibly be any contract between the assessee and some dealers in Madras or between the assessee” and the Sugar Controller. The Board of Revenue under the direction of the High Court of Judicature at Patna submitted under section 25 (3) of the Bihar Sales Tax Act, 1947, the following question for the opinion of the High Court :

“Whether in the facts and circumstances of the case, the disposal of sugar to the Province of Madras is liable to be taxed.”

The High Court answered the question in the affirmative observing that the sugar despatched by the assessee to different Provinces including the Province of Madras under orders of the Controller was liable to be taxed under the provisions of the Bihar Sales Tax Act, 1947. With Special Leave the assessee have appealed to this Court against the judgment of the High Court.

The only question arising in the appeal is whether there was a sale by the assessee of sugar despatched by them to the Provincial Government of Madras in compliance with the directions issued by the Controller in exercise of authority under the Sugar and Sugar Products Control Order, promulgated on 18th February, 1946, by the Central Government under powers conferred by sub-rule (2) of Rule 81 of the Defence of India Rules. The material clauses of the Order concerning sugar are these ; By clause 3 of the Order producers of sugar were prohibited from disposing of or agreeing to dispose of or making delivery of any sugar except to or through a recognised dealer or persons specially authorised in that behalf by the Controller to acquire sugar on behalf of the Central Government or of a Provincial Government or of an Indian State. Clause 5 enjoined upon every producer or dealer duty to comply with such directions regarding production, sales, stocks or distribution of sugar as may from time to time be issued by the Controller. By clause 6 the Controller was authorised to fix the price at which sugar may be sold or delivered, and upon fixation of the price all persons were prohibited from selling or purchasing or agreeing to sell or purchase sugar at a price higher than the fixed price. By sub-clause (1) of clause 7 the Controller was authorised, *inter alia*, to allot quotas of sugar for any specified province ; or area or market and to issue directions to any producer or dealer to supply sugar to such provinces, areas or markets or such persons or organisations, in such quantities, of such types or grades, at such times, at such prices and in such manner as may be specified by the Controller, and sub-clause

(2) provided that every producer shall, notwithstanding any existing agreement with any other person, give priority to, and comply with directions issued to him under sub-clause (1). Clause 11 provided that against a person contravening the provisions of the Order without prejudice to any other punishment to which he may be liable, an order of forfeiture of any stocks of sugar in respect of which the Court trying the offence was satisfied that the offence was committed, may be passed. By sub-rule (4) of Rule 81 of the Defence of India Rules, 1939 contravention of Orders made under the Rule was liable to be punished with imprisonment for a term which may extend to three years or with fine or with both.

The course of dealings between the assesseees and the State of Madras to which sugar was, under the directions of the Controller, supplied by the assesseees is stated by the High Court as follows :—

“ The admitted course of dealing between the parties was that the Government of various consuming States used to intimate to the Sugar Controller of India from time to time their requirement of sugar, and similarly the factory owners used to send to the Sugar Controller of India statements of stock of sugar held by them. On a consideration of the requisitions received from the various State Governments and also the statements of stock received from the various factories, the Sugar Controller used to make allotments. The allotment order was addressed by the Sugar Controller to the factory owner, directing him to supply sugar to the State Government in question in accordance with the despatch instructions received from the competent officer of the State Government. A copy of the allotment order was simultaneously sent to the State Government concerned, on receipt of which the competent authority of the State Government sent to the factory concerned detailed instructions about the destinations to which the sugar was to be despatched as also the quantities of sugar to be despatched to each place. In the case of the Madras Government it is admitted that it also laid down the procedure of payment, and the direction was that the draft should be sent to the State Bank and it should be drawn on Parry and Company or any other party which had been appointed, as stockist importer on behalf of the Madras Government.”

The assesseees contend that sugar despatched pursuant to the directions of the Controller was not sold by them to the Government of Madras, and sales tax was therefore not exigible in respect of those despatches under the relevant Sales Tax Acts of the Province of Bihar. The assessment period in respect of which the dispute is raised is one year—1st April, 1947 to 31st March, 1948 for the first three months the relevant law imposing liability to pay tax was Bihar Act (VI of 1944) and from 1st July, 1947 to 31st March, 1948, liability to pay tax had to be determined under Bihar Act (XIX of 1947). It is common ground that the scheme of the two Acts for levy of tax was similar and the definition of “ sale ” on which primarily the dispute centred under the two Acts was identical. We will therefore refer in dealing with this appeal as if the liability arose under Act (XIX of 1947). The expression “ sale ” as defined under section 2 (g) of the Bihar Sales Tax Act, at the material time stood as follows :

“ Sale means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge.

Provided that a transfer of goods on hire purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale :

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (III of 1930) the sale of any goods which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, shall, wherever the said contract of sale is made, be deemed for the purpose of this Act to have been made in Bihar.”

Apparently in the first paragraph of the definition a transaction (other than a transaction expressly specified) in which there is a transfer of property in goods for valuable consideration, was included as a sale within the meaning of the Act. By the First Proviso transfer of goods on hire purchase or other instalment system of payment are to be deemed sales. The Second Proviso (which has since been repealed) dealt with the *situs* of the sale and was not in truth a part of the definition of sale. What constituted a sale, the Second Proviso did not purport to say: it merely fixed for the purpose of the Bihar Sales Tax Act the place of sale, in the circumstances mentioned therein.

Tax is leviable under the Bihar Sales Tax Act on the gross turnover (exceeding a prescribed minimum) on sales "which have taken place in Bihar". Counsel for the assessee says that the value of sugar despatched in compliance with the directions of the Controller is not liable to be included in the taxable turnover, for there was no sale of sugar, despatched by the assessee, and that in any event the sale did not take place in Bihar. In elaborating his submission counsel says : Under the Government of India Act, 1935 the Provincial Legislature had power to legislate for levy of tax on "sale of goods" under Entry 48 of List II of the Seventh Schedule : that the expression "sale of goods" in the Entry was used not in the popular but in the narrow and technical sense in which it is used in the Indian Sale of Goods Act, 1930 ; that power under the entry could be exercised for taxing only those transactions in which by mutual assent between parties competent to contract property in goods was transferred absolutely from one person to another, in consideration of price paid or promised, and the transactions in which there was no mutual assent as a result of negotiations express or implied are not sales within the meaning of the Sale of Goods Act and therefore not sales within the meaning of the Bihar Sales Tax Act. Counsel alternatively submits that even if the despatches resulted in sales, as the sales did not take place in Bihar, the same were not liable to be taxed under the Bihar Sales Tax Act.

In popular parlance 'sale' means transfer of property from one person to another in consideration of price paid or promised or other valuable consideration. But that is not the meaning of 'sale' in the Sale of Goods Act, 1930. Section 4 of the Sale of Goods Act provides by its first sub-section that a contract sale of goods is a contract where the seller agrees to transfer the property in goods to the buyer for a price. "Price" by clause (10) of section 2 means the money consideration for sale of goods, and "where under a contract of sale property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an 'agreement to sell' (sub-section (3) section 4). It is manifest that under the Sale of Goods Act a transaction is called sale only where for money consideration property in goods is transferred under a contract of sale. Section 4 of the Sale of Goods Act was borrowed almost *verbatim* from section 1 of the English Sale of Goods Act, 56 and 57 Vict., c. 71. As observed by Benjamin in the 8th Edition of his work on 'Sale', "to constitute a valid sale there must be a concurrence of the following elements, viz., (1) Parties competent to contract ; (2) mutual assent ; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer ; and (4) a price in money paid or promised".

The Provincial Legislature by Entry 48, List II of the Seventh Schedule of the Government of India Act, 1935 was invested with power to legislate in respect of "Taxes on sale of goods". The expression "sale of goods" was not defined in the Government of India Act, but it is now settled law that the expression has to be understood in the sense in which it is used in the Sale of Goods Act, 1930. In *The State of Madras v. Gannon Dunkerly & Co.*,¹ this Court in considering whether section 2 (i), Explanation 1 (i) of the Madras General Sales Tax Act (IX of 1939) as amended by the Madras General Sales Tax Amendment Act XXV of 1947, was *intra vires* the Provincial Legislature, has decided that the expression 'sale of goods' in Entry 48, List II is used not in the popular but in the restricted sense of the Sale of Goods Act, 1930. The primary question which fell to be determined in that case was whether in a "building contract which was one, entire and indivisible" there was sale of goods of the building materials used in the execution, liable to be taxed under the Madras General Sales Tax Act which by section 2 (c) defined 'goods' as meaning all kinds of movable property (except certain kinds which are not material in this case) and included all materials, commodities and articles including those to be used in the construction, fitting out, improvement or repair of immovable property,

1. (1958) S.C.J. 696 : (1958) 2 M.L.J. (S.C.) 66 : (1958) 2 A.W.R. (S.C.) 66 : (1959) S.C.R. 379.

and by section 2 (h) defined the expression 'sale' as meaning every transfer of property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes also a transfer of property in goods involved in the execution of a works contract. Power of the Provincial Legislature of Madras to legislate in respect of a levy of tax on the value of goods used in the execution of a works contract was challenged by a firm of building contractors, and this Court held that the power under Entry 48, List II, Seventh Schedule, did not include power to legislate for levying tax on the value of goods used "in the course of a building contract which was one, entire and indivisible". The Court held that the expression "sale of goods" in Entry 48, List II was used not in the popular sense but in the strictly limited sense in which it was defined in the Sale of Goods Act and that the Madras Provincial Legislature had no power to legislate under the power derived under Entry 48 in List II for taxing transactions other than those of sales strictly so called under the Sale of Goods Act. It was observed :

"the expression 'sale of goods' in Entry 48 is a *nomen juris*, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible and that is its norm, there is no sale of goods ; and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale." In *Gannon Dunkerley & Company's case*¹, the Court was concerned to adjudicate upon the validity of the provisions enacted in Acts of Provincial Legislatures imposing liability to pay sales tax on the value of goods used in the execution of building contracts, and the judgment of the Court proceeded on the ground that power conferred by Entry 48, List II was restricted to enacting legislation imposing tax liability in respect of sale of goods as understood in the Sale of Goods Act, 1930, and that the Provincial Legislature under the Government of India Act, 1935 had no power to tax a transaction which was not a sale of goods, as understood in the Sale of Goods Act. The *ratio decidendi* of that decision must govern this case. According to section 4 of the Sale of Goods Act to constitute a sale of goods, property in goods must be transferred from the seller to the buyer under a contract of sale. A contract of sale between the parties is therefore a prerequisite to a sale. The transactions of despatches of sugar by the assessee pursuant to the directions of the Controller were not the result of any such contract of sale. It is common ground that the Province of Madras intimated its requirements of sugar to the Controller, and the Controller called upon the manufacturing units to supply the whole or part of the requirement to the Province. In calling upon the manufacturing units to supply sugar, the Controller did not act as an agent of the State to purchase goods ; he acted in exercise of his statutory authority. There was manifestly no offer to purchase sugar by the Province, and no acceptance of any offer by the manufacturer. The manufacturer was under the Control Order left no volition ; he could not decline to carry out the order ; if he did so he was liable to be punished for breach of the order and his goods were liable to be forfeited. The Government of the Province and the manufacturer had no opportunity to negotiate, and sugar was despatched pursuant to the direction of the Controller and not in acceptance of any offer by the Government.

The High Court observed

"as soon as an application for allotment is made there is an implication of an offer to purchase the quantity of sugar at the price fixed by the Controller from the producer to whom the allotment order is to be made by the Controller. It is also clear that if the allotment order is communicated by the Controller to the assessee and the latter appropriates the sugar in accordance with the allotment order and in accordance with the despatch instructions of the competent officer appointed by the Madras Government, there is in the eye of law an acceptance of the offer by the assessee and a contract is immediately brought into existence between the parties".

We are with respect unable to hold that this view is correct. The Provincial Government of Madras gave intimation of its requirements of sugar to the Controller and applied for allotment of sugar ; thereby the Government was not making

1. (1958) S.C.J. 696 : (1958) 2 M.L.J. (S.C.) 66 : (1958) 2 An.W.R. (S.C.) 66 : (1959) :S.C.R. 379.

any offer to purchase sugar. Evidently the offer could not be made to the Controller because the Controller was not a manufacturer of sugar or his agent. The communication of the allotment order to the assessee was again not of any offer made by the State which it was open to the assessee to accept or decline. Mere compliance with the dispatch instructions issued by the Controller, which in law the assessee could not decline to carry out, did not amount to acceptance of an offer. A contract of sale postulates exercise of volition on the part of the contracting parties and there was in complying with the orders passed by the Controller no such exercise of volition by the assessee. By the Indian Contract Act (IX of 1872) a proposal or an offer is defined as signification by one person to another of his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence. When the person to whom the proposal is made or signified assents thereto, the proposal is said to be accepted. The person making the proposal is called the promisor and the person accepting the proposal is called the promisee, and every promise or every set of promises, forming the consideration for each other is an agreement. These provisions of the Contract Act are by section 2 (15) of the Sale of Goods Act incorporated therein. There was on the part of the Province of Madras no signification to the assessee of their willingness to do or to abstain from doing anything, with a view to obtaining the assent of the assessee to such act or abstinence, and the Controller did not invite any signification of assent of the assessee to the intimation received by them. He did not negotiate a sale of sugar : he in exercise of his statutory authority ordered the assessee to supply sugar to the Government of Madras. We are unable to hold that from the intimation of order of the Controller, and compliance therewith by the assessee any sale of goods resulted in favour of the State of Madras.

Mr. Verma appearing for the State of Bihar contended that even if there was no offer and no acceptance when intimation was sent by the Government of Madras to the Controller, and the Controller, directed the assessee to deliver specified quantities of sugar, still by the conduct of the assessee in despatching sugar to Madras in pursuance of the directions of the Controller and acceptance of price by them, a contract of sale resulted. But the action on the part of the assessee in despatching the goods was not voluntary ; they were compelled to send the goods. They could not be deemed by despatching sugar to have made any offer to supply goods and in the absence of any offer, no contract resulted by the acceptance of goods by the Provincial Government. To infer a contract from the compulsory delivery of sugar and acceptance thereof would be to ignore the true position of the parties, and the circumstances in which goods were delivered. Mr. Verma contended that in any event the Legislature had by the definition included in the expression ' sale of goods ' all transfers of property in goods for consideration and the transactions which are sought to be taxed by the State of Bihar fell within that definition. Counsel submitted that a literal meaning should be given to the words of the Act without any pre-disposition as to what the expression ' sale ' means under the Sale of Goods Act. But if the Bihar Legislature had under the Government of India Act, 1935 no power to legislate in respect of taxation of transactions other than those of sale of goods as understood in the Sale of Goods Act, a transaction to be liable to pay sales tax, had to conform to the requirements of the Sale of Goods Act, 1930. Attributing a literal meaning to the words used would amount to imputing to the Legislature an intention deliberately to transgress the restrictions imposed by the Constitution Act upon the Provincial Legislative authority. It is a recognised rule of interpretation of statutes that the expressions used therein should ordinarily be understood in a sense in which they best harmonise with the object of the statute, and which effectuate the object of the Legislature. If an expression is susceptible of a narrow or technical meaning, as well as a popular meaning the Court would be justified in assuming that the Legislature used the expression in the sense which would carry out its object and reject that which renders the exercise of its powers invalid. If the narrow and technical concept of sale is discarded and it be assumed that the Legislature sought to use the expression sale in a wider sense as including transactions

in which property was transferred for consideration from one person to another without any previous contract of sale, it would be attributing to the Legislature an intention to enact legislation beyond its competence. In interpreting a statute the Court cannot ignore its aim and object. It is manifest that the Bihar Legislature intended to erect machinery within the frame-work of the Act for levying sales tax on transactions of the sale and the power of the Legislature being restricted to imposing tax on sales in the limited sense, it could not be presumed to have deliberately legislated outside its competence. In the definition of the expression 'sale' in section 2 (g) of the Bihar Sales Tax Act it must be regarded as implicit that the transaction was to have all the elements which constitute a sale within the meaning of the Sale of Goods Act. Use of the expression "including a transfer of property in goods involved in the execution of the contract" in the first paragraph of the definition also does not justify the inference that the transfers of property in goods under the earlier part of the definition were not to be the result of a contract of sale. If any such intention was attributed to the Legislature, the legislation may, for reasons already stated, be beyond the competence of the Legislature. The *non-obstante* clause in the Second Proviso is in truth in the nature of an explanation to the charging section; it merely fixes the *situs* of sale. If there is no sale the Second Proviso will have no application.

Mr. Verma finally contended that in *The Tata Iron & Steel Co., Ltd. v. The State of Bihar*¹, by implication it was decided that the definition of 'sale' in section 2 (g) of the Bihar Sales Tax Act included transactions in which goods were supplied in compliance with directions which left no volition to the manufacturers. But this argument is not borne out by what was actually decided in that case. The Tata Iron & Steel Company, Ltd., which carried on the business of manufacturing iron and steel in its factory at Jamshedpur in Bihar was assessed to sales tax under the Bihar Sales Tax Act, 1947. The company sent its goods from its factory to different Provinces and Indian States by rail, the railway receipts being obtained by the company in its own name as consignor and consignee. The Branch Offices of the company or its Bankers at the destination handed over the railway receipts to the purchasers against payment of the price. The Sales Tax Officer of the State of Bihar included in the gross turnover of the company the value of goods manufactured in Bihar but delivered and consumed outside the State of Bihar in the manner already stated. The contention of the company that the goods delivered were not liable to be included in the taxable turnover was negated by the taxing authorities, and the High Court of Patna. The matter was then carried in appeal to this Court, and it was held that the provisions of section 4 (1) read with section 2 (g), Proviso 2 of the Bihar Sales Tax Act was within the legislative competence of the province of Bihar. It was pointed out that the Second Proviso to the definition of 'sale' in section 2 (g) of the Act did not extend the meaning of sale so as to include therein a contract of sale, what it actually did was to lay down certain circumstances in which a sale, although completed elsewhere, was to be deemed to have taken place in Bihar. Those circumstances did not constitute a sale, but only located the *situs* of such sale. The Court in that case was not called upon to consider whether a transaction to be a sale must be preceded by a contract of sale: the Court was merely considering the *vires* of the Second Proviso to section 2 (g) of the Bihar Sales Tax Act. Das, C.J., in delivering the judgment of the majority of the Court observed:

"The basis of liability under section 4 (1) remained as before, namely, to pay tax on 'sale'. The fact of the goods being in Bihar at the time of the contract of sale or the production or manufacture of goods in Bihar did not by itself constitute a 'sale' and did not by itself attract the tax. The taxable event still remained the 'sale' resulting in the transfer of ownership in the thing sold from the seller to the buyer. No tax liability actually accrued until there was a concluded sale in the sense of transfer of title. It was only when the property passed and the 'sale' took place that the liability for paying the sales tax under the 1947 Act arose. There was no enlargement of the meaning of 'sale' but the Proviso only raised a fiction on the strength of the facts mentioned therein and deemed the 'sale' to have taken place in Bihar. Those facts did not by themselves constitute a 'sale' but those facts were used for locating the *situs* of the sale in Bihar. It follows, therefore, that the provisions of section 4 (1)

1. (1958) S.C.J. 818 : (1958) S.C.R. 1355.

read with section 2 (g), Second Proviso, were well within the legislative competency of the Legislature of the Province of Bihar."

In *Tata Iron & Steel Co., Ltd. case*¹, the question as to the true content of the expression 'sale' in the Bihar Sales Tax Act did not fall to be determined, and the principle of the case can have no application in deciding the present case.

It would be fruitless to enter upon a detailed discussion of the two decisions of the House of Lords cited at the Bar: *The Commissioner of Inland Revenue v. New Castle Breweries Ltd.*², and *Kirkness (Inspector of Taxes) v. John Hudson & Co., Ltd.*³. It may be sufficient to observe that in the first of these cases, goods belonging to the assessee were taken over by order of the Admiralty, acting under the relevant Regulations, and in compliance with the order of a Compensation Court, the assessee was paid an amount exceeding £5,000 being the difference between the amount originally paid and the amount settled as due under the order of the Compensation Court. The House of Lords held that the transaction under which the Admiralty took over the goods was a sale in the business, and although no doubt it affected the circulating capital of the assessee it was nonetheless proper to be brought into the profit and loss account arising from the assessee's trade for the purpose of computation of liability to pay Excess Profits duty. In *Kirkness (Inspector of Taxes) v. John Hudson's case*³, it was held by the House of Lords that the vesting of a company's railway wagons in the Transport Commission under section 29 of the Transport Act, 1947, with compensation fixed in the form of transport stock under the relevant sections of that Act did not constitute a sale for the purpose of section 17 of the Income-tax Act, 1945 so as to render the company liable to a balancing charge under that section. The cases turned upon the meaning of 'sale' for the purposes of the Excess Profits Tax legislation and the Income-tax Act, 1945 (8 & 9 Geo. 6, c. 32) and observations made therein have little relevance in determining the limits of the legislative power of the Provincial Legislature under the Government of India Act, 1935 and the interpretation of statutes enacted in exercise of that power.

The second contention raised by counsel for the assessee requires no elaborate consideration. If it be assumed that the intimation of the requirement by the *State of Madras to the Controller amounted to an offer, delivery of sugar by the assessee* pursuant to such an order would constitute a sale within the meaning of section 2 (g) of the Bihar Sales Tax Act by the Second Proviso which has been held *intra vires* by this Court in *Tata Iron & Steel Co., Ltd.'s case*¹ the assessee would be liable to pay sales tax, for it is not in dispute that at the time when the orders were received from the Controller the goods were within the State of Bihar and the condition prescribed by section 2 (g) Second Proviso for locating the *situs* of the sale is fulfilled.

But the intimation by the Province of Madras of its requirements did not amount to an offer, and the supply of goods pursuant thereto could not amount to a sale; consequently liability to pay sales tax under the Bihar Sales Tax Act on the amount received by the assessee from the Government of Madras for sugar supplied did not arise.

Hidayatullah, J.—I regret my inability to agree that *Gannon Dunkerley's case*⁴ can be extended to cover the facts here. I would confirm the decision of the High Court and dismiss these appeals for the reasons I proceed to give. These reasons are applicable to all the appeals in to-day's group.

This case is concerned with the levy of sales tax under the Bihar Sales Tax Act, 1944 (VI of 1944) for a period of three months—1st April, 1947 to 30th June, 1947, and another of the nine months following, under the Bihar Sales Tax Act, 1947 (XIX of 1947). The assessee companies in all these appeals run sugar mills and are admittedly dealers under these Acts and the commodity on the sale of which tax was sought to be levied was sugar. The disputed tax relates to supplies of

1. (1958) S.C.J. 818 : (1958) S.C.R. 1355.

2. 12 Tax Cases 927.

3. L.R. (1955) A.C. 696.

4. (1958) S.C.J. 695 : (1958) 2 M.L.J. (S.C.) 66 : (1958) 2 An.W.R. (S.C.) 65 : (1959) S.C.R. 379.

sugar made by the assessee companies under the orders of the Sugar Controller of India to certain Provincial Governments in the relevant periods. There is only one contention of the assessee companies in these appeals and it is that in the circumstances of the case there was no 'sale' of sugar, regard being had to the decision of this Court in *Gannon Dunkerley's case*¹ and the amounts received from the Provincial Governments should not be included in the taxable turnover.

I have already mentioned that the assessment period in this case is one whole year—1st April, 1947 to 31st March, 1948, and that it is divided into two parts of three months and nine months respectively governed by the two Acts. There was however no difference in the mode of dealing in this case in the two periods. In the other cases the assessment periods were different but there was no other difference. The transactions were stereotyped being under the Sugar and Sugar Products Order, 1946, which was passed by the Government of India on 18th February, 1946, in the exercise of powers conferred by sub-rule (2) of rule 81 of the Defence of India Rules. The mode, which has been accepted by the parties, as correctly summarised was as follows :—

"The admitted course of dealing between the parties was that the Government of various consuming States used to intimate to the Sugar Controller of India from time to time their requirement of sugar, and similarly the factory owners used to send to the Sugar Controller of India statements of stock of sugar held by them. On a consideration of the requisitions received from the various State Governments and also the statements of stock received from the various factories, the Sugar Controller used to make allotments. The allotment order was addressed by the Sugar Controller to the factory owner, directing him to supply sugar to the State Government in question in accordance with the despatch instructions received from the competent office of the State Government. A copy of the allotment order was simultaneously sent to the State Government concerned, on receipt of which the competent authority of the State Government sent to the factory concerned detailed instructions about the destinations to which the sugar was to be despatched as also the quantities of sugar to be despatched to each place. In the case of the Madras Government it is admitted that it also laid down the procedure of payment, and the direction was that the draft should be sent to the State Bank and it should be drawn on Parry & Company or any other party which had been appointed as stockist importer on behalf of the Madras Government. It should be added that in this case the assessee was called upon to produce necessary documents relating to the transactions in question, but the assessee did not produce the documents. The assessee, however, admitted that general arrangement between the parties was the one set out in this paragraph."

Two typical documents in this connection may be read and they are the permit by the Controller and the despatch order sent by the Provincial Government. They were not produced in this case but can be seen in the record of C.A. No. 633 of 1961 at pages 15, 16. First the Permit :

No. 78 P. (1)/46/7132.
Office of the Sugar Controller for India.
GOVERNMENT OF INDIA.
Department of Food.

Dated Simla, the 12-11-56.

ORDER.

In exercise of the power conferred by clause 7 of the Sugar and Sugar Products Control Order, 1943,

1. Shashi Kiran, Assistant Sugar Controller for India, having been duly authorised in this regard under clause 2 of the said Order by the Sugar Controller for India hereby direct you to supply 1,200 tons/maunds of sugar by 31st January, 1947 to Bengal in accordance with the despatching instructions of the Director of Civil Supplies, Bengal, Calcutta.

2. A permit No. 1988 to enable you to despatch sugar in compliance with this order is attached.

(Sd.) Shashi Kiran,

Asst. Sugar Controller for India.

To

The Motilal Padampat Sugar Mills Co., Ltd.,
Majhowlia, District Champaran.

And now the despatch order:—

"EXPRESS

MOTIPAT

STATE

MAJHOWALIA
UNDERSTAND SUGAR CONTROLLER ISSUED PERMIT FOR 600 TONS SUGAR THIS
PROVINCE FULLSTOP DESPATCH IMMEDIATELY 300 TONS MANGALORE DRAFTS

1. (1958) S.C.J. 696 : (1958) 2 M.L.J.
S.C.) 66 : (1958) 2 An.W.R. (S.C.) 66 :

(1959) S.C.R. 379.

ON ME THROUGH GENERAL BANK CALICUT 300 TONS COIMBATORE DRAFTS ON ME THROUGH CENTRAL BANK MADRAS FULLSTOP SEND RAIL RECEIPTS FOR EACH WAGON LOAD OR 100 BAGS LOAD WAGONS FULL CAPACITY FULLSTOP BOOK AT RAILWAY RISK IF NO SPECIAL RATES IN FORCE.

PRICES

T. R. L. Narasimhan,
Assistant Secretary.

Post copy in confirmation to Motilal Padampat Sugar Mills, Ltd., Mojhowlia, Champaran District.

Forwarded/By order

(Sd.) Illegible,

Supt., Board of Revenue

(Civil Supplies), Chepauk, Madras".

Kitta, 10-5-47.

These documents between them disclose that free trading in sugar was not possible. All Provinces intimated their requirements to the Controller who was kept informed by the Mills about the supplies available. The price was controlled and the Controller directed the supply of a certain quantity from a particular Mill to an indenting Province. After giving his permit and sending a copy of this permit to each party, the Controller passed out of the picture and the Mill supplying and the Province receiving the supply (I am avoiding the words seller and buyer since that is the point to decide) arranged the rest of the affair including the issue of despatch instructions regarding the quantity and the quality to be sent to different areas and the payment of price.

The question is whether there was a 'sale' in the circumstances and the price should be included in the turnover for purposes of sales tax under the Bihar Sales Tax Act for the time being in force. The definition of sale in the two Bihar Acts at all material times was :—

"2 (g) "sale" means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge :

Provided that a transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale :

Provided further that notwithstanding anything to the contrary in the Indian Sales of Goods Act, 1930 the sale of any goods which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, shall wherever the said contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar."

In the present case, we are required only to decide whether, regard being had to the decisions of this Court expounding the ambit of Entry No. 48 of List II, Seventh Schedule of the Government of India Act, 1935, the tax could not be 'demanded as there was no sale of sugar at all. The entry in question is—

"48. Taxes on the sale of goods and on advertisement."

"Goods" was defined in section 311 as follows :—

"'Goods' include all materials, commodities and articles."

The White Paper had the entry "taxes on the sale of commodities and on the turnover". It was altered to "taxes on the sale of goods" and as pointed out by Gwyer, C.J., in *In re The Central Provinces & Berar Act XIV of 1938*¹, it is idle to speculate what the reason was. The expression "sale of commodities" would not have taken the mind to the Sale of Goods Act as the re-drafted entry does.

There is no provision in the whole of the Government of India Act, 1935 which expressly seeks to limit the meaning of the plain words "taxes on the sale of goods" which include all materials, commodities and articles. Such a limitation could of course arise from a competing entry in List No. 1. Otherwise the entry conferred powers as large and plenary as those of any sovereign Legislature. The ambit of the entry, prior to the inauguration of the Constitution, was the subject of three leading decisions by the Federal Court, in one of which there was also an appeal to the Privy

1. (1937-38) F.L.J. (S.C.) 1 : (1939) 1 M.L.J. (Sup.) 1 : (1939) F.C.R. 16.

Council. The first case was *In re The Central Provinces and Berar Act XIV of 1938*¹, a Reference under section 213 of the Constitution Act of 1935. In that case the imposition of sales tax or retail sales on motor spirit and lubricants was questioned on the ground that though described as tax on the sale of motor spirit, etc., the tax was, in effect, a duty of excise under Entry 45 of List I and there being an overlap between the two entries that in List I must prevail. Legislative practice in respect of Excise Duty was invoked but as sales tax legislation did not exist in India before 1938 there was no legislative practice to consider on the meaning of the expression "tax on sale of goods". The Government of India claimed that the Entry 48, List II must be limited to a direct tax like a turnover tax which is not identifiable in the price. Taxes on retail sales, it was argued, being indirect and identifiable in the price, were more of the nature of an excise duty and the pith and substance of the Act being this, the impugned Act was bad.

The main argument on behalf of the Provinces, which was accepted, was that the Constitution Act must not be construed in any narrow and pedantic sense. Gwyer C.J., expressed himself forcefully on this point in the following words:—

"I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it...."

The essence of the argument on the part of the Provinces was that if only a turnover tax (which was a species of sales tax) was meant why was a wider expression used in the entry? It was, therefore, contended that the entry should not be truncated and the plain words of the entry should be given their normal and ordinary meaning. The contention of the Provinces prevailed. Though the learned Judges pointed out that the words were "taxes on the sale of goods" and not "sales tax", *simpliciter*, thereby excluding taxes on services which in some systems are regarded also as sales tax, the words were wide enough to include more than a mere turnover tax. It was held that the power included a power to levy a tax or duty on the retail sale of goods and this did not impinge upon the power of the Legislative Assembly to make laws "with respect to" duties of excise.

In the next case, the *Province of Madras v. Boddu Paidanna & Sons*², Government of India reversed its stand and contended that the power of the Provincial Legislatures did not extend to levying sales tax on first sales but only after the goods were released by the producer or manufacturer. The argument of the Government of India was not accepted and it was declared that the power of a Provincial Legislature to levy a tax on the sale of goods extended to sales of every kind and at all stages between a producer or manufacturer and a consumer. The Central Government had filed a suit and the third case before the Federal Court was an appeal from that decision. The Federal Court followed its own decision in *Boddu Paidanna's case*². The Central Government appealed to the Judicial Committee and the judgment is to be found in *Governor-General in Council v. Province of Madras*³. The Judicial Committee examined in detail the provisions of the Madras General Sales Tax Act, 1939 to emphasize its essential character and observed that:—

"Its real nature, its 'pith and substance', is that it imposes a tax on the sale of goods. No other succinct description could be given of it except that it is a "tax on the sale of goods". It is, in fact, a tax which according to the ordinary canons of interpretation appears to fall precisely within Entry No. 48 of the Provincial Legislative List."

In repelling the contention that first sales were not included in the entry their Lordships observed that it did violence to the plain language and implied the addition of the words "other than first sale of goods manufactured or produced in India". The Judicial Committee expressed itself in complete agreement with the two decisions of the Federal Court.

The ambit of the entry was thus settled to be that it included all 'sales of goods' though not 'services' from the first sale by the producer or manufacturer to the last sale to the consumer and that the tax could be collected on wholesales or retail

1. (1937-38) F.L.J. (S.C.) 1: (1939) 1 M.L.J. 327: (1942) F.C.R. 90.
 (Sup.) 1: (1939) F.C.R. 18. 3. L.R. 72 I.A. 91: (1945) F.L.J. (S.C.) 69:
 2. (1942) F.L.J. (F.C.) 61: (1942) 2 M.L.J. (1945) 1 M.L.J. 225: (1945) F.C.R. 179: (P.C.)

sales as well as on the turnover. It was however pointed out that the expressions "sales tax" and "taxes on the sale of goods" were not the same, the first including sales other than those of goods. No definition of what is "sale" was attempted in these cases either with or without reference to the Sale of Goods Act.

Thus it was firmly established that the entry "taxes on the sale of goods" authorised the making of laws for the imposition of tax on all transactions of sale of goods from the manufacturer or producer to consumer. It also could be imposed on the turnover which meant the sum total of prices for which taxable goods were sold in a particular period. The definition of 'goods' was enlarged to include "commodities, materials and articles." The word "commodities" indicated "articles of trade," the word "materials" indicated "matter from which things are made", (the use of the word being the same as in the expression 'raw materials') and by "articles" was meant "any particular thing". In this way it was clearly indicated that articles sold by way of trade or otherwise were equally within the expression 'goods' and also finished articles and raw materials from which finished articles are made.

The entry was framed in 1935 in the form with which we are concerned. Previously it read in the White Paper "taxes on sale of commodities and turnover". The reframed entry was wider in one respect (it included materials and articles in the sense explained) and apparently narrower in another (by omitting 'turnover') than the original entry. There was no occasion to expound the meaning of 'goods' in the two Federal Court decisions but the decisions laid down that 'turnover' was included even though not expressly mentioned.

I have already said above that prior to 1938 a tax on the sale of goods was not imposed in India. It is claimed that in ancient times sales tax was levied in India but we do not have to delve into these matters. The tax, as it is known to-day, is of comparatively modern growth though economists have traced it to Ptolemies, Greeks and Romans. Findlay Shirras and other writers give us the history of the tax. It was imposed in a recognisable form in Spain in 1342 and was known as the *sakabala*. This notorious tax continued for five hundred years. In France it was also imposed in the fourteenth century but was soon given up. We are not concerned with these ancient progenitors of the modern tax. They could not have influenced the selection of the tax or its form. The modern tax was the result of the First World War. Germany imposed in 1916 a turnover tax called '*die Umsatzsteuer*' and that is the form in which the tax is collected there. France followed a year later but with a transaction tax which was known as '*L'impôt sur le chiffre d'affaires*'. Soon other countries followed as it was almost as productive as customs and income-tax. By the time the Government of India Act, 1935 was passed, no less than thirty countries had imposed this tax in different forms. India, however, was not one of them.

The period in India following the First World War opened with the Government of India Act with its Devolution Rules and the allocation of taxes by the Scheduled-tax Rules, to the Provinces framed in 1920. The latter Rules contained only *octroi* and taxes on markets and trades, professions and callings which resembled very distantly, the modern sales tax. Indeed, sales tax was first visualized in the Report of the Taxation Enquiry Committee (1924-25) but only as a modification of the *octroi* through the intermediate steps of taxing markets and slaughter-houses. It was hoped that price competition would stop inclusion of the tax in the price. It would have been a vain attempt to convert an indirect tax into a direct one: The Committee visualized it as a composition tax from traders but it was realized that the tax would soon get converted into a tax on sales of goods, or, of services like those of a doctor or goldsmith and that it would be difficult to separate services from goods in cases where the two were combined. It was also recognised that turnover taxes imposed on persons in respect of raw materials and finished goods tended to be cumulative, but taxes imposed at one point did not have that vicious tendency. The difficulty of *entrepot* trade in *octroi*, where goods bore the tax whether or not

consumed, sold or used was avoided because the tax under retail sales tax scheme was payable only when the goods were actually sold and being *ad valorem* bore lightly on cheap goods. The suggestions were—

- (1) A turnover tax on retail merchants ;
- (2) registration of such dealers ;
- (3) collection of taxes quarterly ;
- (4) licensing of and charging of fees from petty traders and hawkers whose turnovers were uncertain as no accounts were maintained by them.

Sales tax particularly that imposed on goods assumed by 1935 different forms in different countries. Its incidence was sometimes the turnover, sometimes whole-sale and sometimes the retail sale. In Canada and Australia it was a producers 'or manufactures' tax almost of the nature of excise. In France the excise and sales tax were interchangeable, the former being a replacement tax on the turnover of the manufacturer. In Germany the tax included both goods and services, in France services were excluded unless there was a commercial element. In England, it took the form of a purchase tax. France also devised a simpler method by imposing a *forfait* a lump sum which represented, so to speak, a quit tax. In Belgium it was collected by stamps from both the seller and the buyer according to their respective invoices. In America the position was unique. It can be stated from a passage from Beuhler's Public Finance (3rd Edn.), page 410—

"A sales tax is an excise in so far as it is imposed upon domestic transactions of commodities, and it may also have some of the aspects of customs duties because national sales taxes commonly fall upon importing and sometimes upon exporting. The popular name for American excises is sales taxes. Not all excises are imposed upon sales or the privilege of selling, however, for they may be placed upon the purchase or use of commodities, including services."

The varieties this elastic tax took in that country is illustrated from the following passage from the same author—

"Here, again, there is no standard usage, for selected sales taxes are often called sales taxes, limited sales taxes, selective sales taxes, and special sales taxes, while general sales taxes may be called sales taxes, turnover taxes, manufacturers' sales taxes, retail sales taxes and gross receipts or gross income taxes."

It was in the background of these laws of foreign countries and the recommendations of the Taxation Inquiry Committee that the entry in the Government of India Act, 1935 was framed. Taxes on the sale of goods being a kind of commodity taxes had to be demarcated from other commodity taxes like excise, *octrois*, terminal tax, market dues, etc. The difficulty was solved by viewing the goods as the subject of taxation in different stages. These stages were production, movement, sale and consumption. Taxes on production of goods which were excise proper were given to the Centre with certain exceptions (Entry 45, List I and Entry 40 of List II), taxes on sale of goods were given to the Provinces (Entry 48, List II), while taxes on movement of goods were divided—those carried by railway and air being allotted to the Centre as terminal taxes (Entry 58, List I) and those carried by Inland Waterways being allotted to the Provinces (Entry 52, List II). Taxes on the entry of goods in a local area for consumption, use or sale (*octrois*) were allotted to the Provinces (Entry 49, List II). This was the demarcation of commodity taxes in addition to local taxes for local purposes.

The two cases of the Federal Court to which detailed reference had been made above outlined the scope of competing entries relating to duties of excise and taxes on the sale of goods. It was pointed out that though there was an overlap the taxes were different. In the recent case of *The Automobile Transport, Rajasthan, Ltd., etc. v. The State of Rajasthan and others*¹, I have given the history of the distribution of the heads of revenue on the eve of the Government of India Act, 1935 and have there pointed out that the attempt was to give adequate resources to the Provinces to enable Provincial Governments to undertake nation-building activities. It

was there pointed out by me that experts at that time were in favour of allotting an elastic tax like sales tax to the Provinces as the main source of revenue and abolish altogether the category of deficit Provinces and the subventions. It was expected that land revenue would have to be reduced and income-tax could not be increased beyond a point. The only tax that was new and fell imperceptibly upon consumers was the sales tax and it was allotted to the Provinces. It was expected to be a very productive tax, an expectation which has been amply fulfilled. In 1954-55, this tax alone yielded about 60 crores and it has been even more productive since.

The inroads upon the tax were many but they were resisted in the pre-Constitution period by the Provinces both in Courts and in administration. Indeed, appeals were made in cases before the Federal Court, not to cut down unduly the ambit of the natural words and Jayakar, J., mentioned them in his judgment with sympathy. I feel that what he said will bear repetition here :—

“ A powerful appeal was made to us by the Advocates-General of the Provinces that, consistently with its terminology, we should so interpret Entry No. 48 (List II) as to give it a content sufficiently extensive for the growing needs of the Provinces. It was argued that provincial autonomy granted by the new scheme of government would be unmeaning and empty, unless it was fortified by adequate sources of revenue. Whatever value such an appeal may have in a judicial decision, I personally appreciate it, and I feel no doubt that the interpretation that I am placing on Entry No. 48 (List II) is sufficiently practical to leave an adequate source of revenue in the hands of the Provinces without making inroads on Central preserves. I may add here that the several authors I have been able to consult on this point agree in their opinion that, since the War, a tax on the sale of goods has proved to be both productive and practicable in many countries, under circumstances not very different from those prevailing in the Provinces of India. The yield naturally varies with the scope and rates of the tax, business conditions and administrative efficiency, but it is stated that the tax itself has become a major source of revenue in a number of countries, yielding more than the income-tax in a few instances and nearly as much other sources of revenue in others”.—*In re the Central Provinces and Berar Act (XIV of 1938)*.¹

The two cases of the Federal Court having established the area of operation of Entry No. 48, List II in relation to the competing entry relating to excise, the Provinces attempted to extend the tax to cover all situations. This was done by incorporating definitions of ‘sale’ which in some respects were inconsistent with the definition in the Indian Sale of Goods Act. The Taxation Enquiry Commission (1953-54) gave in its report an analysis of how these definitions ran and I find it convenient to quote from the report (page 10, para. 24. Volume III) :—

“ In Madras, Mysore, Travancore-Cochin and Hyderabad, sale means transfer of property in the course of trade or business. By implication, all other sales are excluded. Casual sales by individuals, sales of food by hostels attached to educational institutions, sales of old furniture for example, by firms not dealing in furniture and so on are, therefore, not liable for the tax in these States. The States of Bengal and Delhi define sale as transfer of property in goods for money consideration which accordingly excludes transfers for other consideration like exchange or barter. According to the Acts of certain States, the sale is deemed to have taken place in the territory of the State, if at the time when the contract of sale or purchase was made, the goods were actually in those States. In certain States, the transfer of property in goods supplied in the execution of a contract is also included in the definition of sale.”

The definitions led to a variety of decisions on the meaning of the word “sale” which were likely to bewilder the common man. The Taxation Enquiry Commission summed up the situation in the following words :—

“ The layman who asks : “ What is a sale ? ” would not have to go without an answer ; he would find plenty of replies in the reported judgments of Courts of law ; and he would not be a layman if, piecing them together, he was able to say when, where and how a sale becomes a sale which a sales tax may tax.”

From the earliest times the extension of the word “sale” was in three recognisable directions. Firstly, the definition by a fiction took in transactions of sale in which the goods were produced in the Provinces or were in the Province at the time the contract of sale took place, no matter where the contract could, in law, be said to have taken place. In other words, by a fiction incorporated in the definition of sale, the *situs* of sale could be established in the Province. Secondly, forward

transactions in which the passing of property was postponed to a future date, if at all it took place, were included in the definition of "sale". Thirdly, materials in a works contract, where the bargain was for a finished thing, were treated as the subject-matter of sale.

Laws in which transactions of sale were sought to be taxed on the ground that goods were in the Province or some part of the component elements of a contract of sale took place in the Province were generally upheld by the High Courts. In these cases the doctrine of *nexus* was extended to sales tax legislation following the analogy of the decision of the Privy Council in *Wallace Brothers, etc. & Co. v. Commissioner of Income-tax, Bombay*¹. These cases recognised the sovereignty of Provincial Legislatures which were erected by the British Parliament in its own image and which within the jurisdiction conferred by a legislative entry enjoyed powers as large and ample as those of the British Parliament. It was generally held that in the plenitude of that power it was open to the Provincial Legislatures to tax transactions of sale in which there was sufficient *nexus* between the Province and the taxable event namely the sale, and that the Provincial law could by a fiction bring the whole transaction into the Province for purposes of tax.

The Supreme Court also took substantially the same view in the *State of Bombay v. The United Motors, Ltd.*², *Bengal Immunity Co., Ltd. v. State of Bihar*³, *Tata Iron and Steel Co., Ltd. v. State of Bihar*⁴ and *Commissioner of Sales Tax v. Husenali*⁵.

The meaning of the word 'sale' in the Entry was laid down in several cases but I shall refer to only one of them. In *Poppattal v. State of Madras*⁶ Venkatarama Ayyar, J. (Rajamannar, C.J. concurring) observed as follows:—

"The word 'sale' has both a legal and a popular sense. In the legal sense it imports passing of property in the goods. In its popular sense it signifies the transaction which results in the passing of property. To a lawyer the legal sense would appear to be the correct one to be given to the word in the Sales Tax Act. That is the conception which is familiarised in the provisions of Sale of Goods Act. If one leaves out of account sales tax legislation which is of comparatively recent origin, questions relating to sale of goods usually come up before the Court only in connection with disputes between the sellers and purchasers. If the goods perish, on whom is the loss to fall? If the purchaser becomes insolvent before payment of price can the goods be claimed by the trustee in bankruptcy?"

For deciding these and similar questions it is necessary to determine at what point of time the property in goods passed to the purchaser. Sometimes when the point for determination is as to jurisdiction of Courts to entertain suits based on contract, it may be material to consider where property in the goods passed, that being part of the cause of action. These being the questions which are accustomed to be debated in connection with sale of goods, it is natural that a lawyer should, as a matter of first impression approach the question of sale under the Sales Tax Act with the same concept of a sale. But if the matter is further considered it will be seen that considerations which arise under the Sales Tax Act are altogether different from those which arise under the Sale of Goods Act.

The object of the Sales Tax Act is to impose a tax on all sales and it is a tax imposed on the occasion of sale. So far as the Government is concerned, it would be immaterial at which point of time property in the goods actually passed from the seller to the buyer. Of course, there must be a completed sale before tax can be levied and there would be a completed sale when property passes. That is the scope of the definition of sale in section 2 (h). But when once there is a completed sale, the question when property passed in the goods would be a matter of no concern or consequence for purposes of the Sales Tax Act. The Government is interested only in collecting tax due in respect of the sale and the only fact about which it has to satisfy itself is whether the sale took place within the Province of Madras. In this context the popular meaning of the word is the more natural and there is good reason for adopting it. Our conclusion accordingly is that the word 'sale' in the Madras General Sales Tax Act must be understood in a popular sense and sales tax can be levied under the Act if the transaction substantially takes place within this Province, notwithstanding that the property in the goods does not pass within the State."

Against the decision of the High Court of Madras an appeal was filed in this Court and the judgment of this Court is reported in *Poppattal Shah v. State of Madras*⁷. The appeal was allowed. On the question of territorial *nexus* this Court agreed with the Madras High Court but on the question of the meaning of the word "sale" it

1. L.R. 75 I.A. 86 : (1948) F.L.J. (F.C.) 32 : (1948) 2 M.L.J. 62 : (1948) F.C.R. 1 P.C.

2. (1953) S.C.J. 373 : (1953) 1 M.L.J. 743 : (1953) S.C.R. 1069.

3. (1955) S.C.J. 672 : (1955) 2 M.L.J. (S.C.) 168 : (1955) 2 S.C.R. 603.

4. (1958) S.C.J. 818 : (1958) S.C.R. 1355.

5. (1960) S.C.J. 1193 : (1959) Supp. 2 S.C. R. 702.

6. (1952) 2 M.L.J. 593 : A.I.R. 1953 Mad. 91.

7. (1953) S.C.J. 369 : (1953) 1 M.L.J. 739 : A.I.R. 1953 S.C. 274 : (1953) S.C.R. 677.

expressed itself differently. In an earlier case *State of Travancore-Cochin and others v. The Bombay Co., Ltd.*¹, this Court had reserved the question whether the word 'sale' had the same meaning as in the law relating to the sale of goods or a wider meaning. In *Poppattal Shah's case*², the Supreme Court, referred to the decision of the Madras High Court³ that the word was used in a popular sense and without any expression of disapproval held that there was no indication of the popular meaning of sale in the definition in the Madras General Sales Tax Act where unmistakably stress was laid 'on the element of transfer of property in a sale and no other.' The Bench held that the presence of goods within the Province at the time of the contract would have made the sale, if subsequently completed, a sale within the Province by reason of the *Explanation* added by (Act XXV of 1947), but as the *Explanation* was not in operation during the relevant period the assessment of sales tax was held to be illegal and unwarranted by the law as it then stood.

It would appear from this that this Court took the view that the word 'sale' in the entry "Taxes on the sale of goods" was used in a sense wider than that commonly accepted in the law relating to sale of goods, and the judgment of Venkata-rama Ayyar, J. in the Madras High Court on this part was not questioned. Then came a decision of the Allahabad High Court from which an appeal was brought to this Court. The judgment of this Court is reported in the *Sales Tax Officer, Pilibhit v. Messrs. Budh Prakash Jai Prakash*⁴. The definition of the word 'sale' in the U. P. Sales Tax Act (XV of 1948) included 'forward contracts', and this part of the definition was declared *ultra vires* Entry 48 in List I of the Government of India Act, 1935 and *Explanation III* to section 2 (h) of that Act which provided that forward contract "shall be deemed to have been completed on the date originally agreed upon for delivery" and also section 3-B taxing turnover of dealers in respect of transactions of forward contracts were also declared *ultra vires*. Venkata-rama Ayyar, J., speaking for this Court held that under the statute law of England and also of India there was a well-recognised distinction between "sales" and 'agreements to sell' though they were grouped under the generic name of "contracts of sale." The distinction, it was pointed out, lay in the transfer of property which, if simultaneous with agreement, made for a sale, but if in the future, operated only for an agreement to sell. In the latter case property could only pass as required by section 23 of the Sale of Goods Act. Relying on the observation of Benjamin on Sale that—

"In order to constitute a sale there must be :

- (1) An agreement to sell, by which alone the property does not pass ; and
- (2) an actual sale, by which the property passes."

the learned Judge observed that though the definition of a *contract of sale* included a mere agreement to sell as well as an actual sale, there was a distinction between the two which led to different remedies and Entry No. 48 when it spoke of 'sale' meant a completed sale involving transfer of title. The question whether the Legislature in the exercise of its sovereign powers for purposes of taxing the event of sale could treat a sale as complete when there was a final agreement for purchase and sale even though price was not paid was apparently not mooted before this Court. Emphasis was laid on the definition of 'turnover' as the aggregate of the proceeds of sale by a dealer, and it was pointed out that there could be no aggregate of prices unless the stage had been reached when the seller could recover the price under the contract, it being well-settled in the law under the sale of goods that "an action for price is maintainable only when there is a sale involving transfer of the property in the goods to the purchaser" and that "where there is only an agreement to sell, then the remedy of the seller is to sue for damages for breach of contract and not for the price of the goods." The exceptional circumstance when under an agreement between the parties the price is payable on a day certain irrespective of delivery was considered not material for the purpose of the discussion.

1. (1952) S.C.J. 527 : (1953) 1 M.L.J. 1 : 3. (1952) 2 M.L.J. 593: A.I.R. 1953 Mad. 91.
 (1952) S.C.R. 1112. 4. (1954) S.C.J. 573 : (1954) 2 M.L.J. 124 :
 2. (1953) S.C.J. 369 : (1953) 1 M.L.J. 739 : (1953) 1 S.C.R. 243.
 1. 33) S.C.R. 677 : A.I.R. 1953 S.C. 274.

In these cases by the application of the legislative practice relating to sale of goods the meaning of the expression "taxes on sale of goods" was determined and future contracts in which delivery and payment of price were deferred were held to be outside the purview of the Entry. There can hardly be any doubt that the entry is concerned with a completed sale because it is only a 'sale' which can be taxed and not anything which is short of a sale and if a transaction which is sought to be taxed is merely in the region of an agreement *de futuro* there is no taxable event. The opinion that if there be a completed sale then the law dealing with taxation would be indifferent whether price was paid or not expressed by Venkatarama Ayyar, J., in *Poppattal Shah's case*¹, of the Madras High Court was not accepted.

Then came the third batch of cases. This batch was concerned with the taxing of materials which were supplied and used as part of building or repair operations, like bricks, timber and fittings in buildings girders, beams, rails, etc. in bridges, spare parts in repair of motor vehicles, etc. Two distinct views were held by the High Courts. The Madras High Court in *sub nom Gannon Dunkerley & Co. v. State of Madras*², held that such transactions did not involve a sale of goods and there could be no tax. A contrary view was expressed in *Pandit Banaridas v. State of Madhya Pradesh*³ where it was held that such contracts involved both labour as well as materials and in as much as materials were goods and property in them passed, it was within the competence of the Provincial Legislatures to separate the sale of goods from the composite and entire transactions and to tax them. It was pointed out that legislative practice in relation to the Sale of Goods Act was not conclusive and though it could not be doubted that a limited Legislature could not create a power for itself which did not flow from an entry, the entry itself must be given the widest amplitude possible and its scope should not be cut down by anything not found in the Constitution Act, 1935. It was, therefore, concluded:—

"The text being explicit, the text is conclusive alike in what it directs and what it prohibits. The necessary conditions for the import, however, were that there should be a sale of goods. The selection of the taxable event and the severance of transactions of sale from other transactions in which they might be embedded was a necessary part of the power. The Legislature could not say that a contract of service amounted to a sale of services (goods) but it could tax a genuine transaction of sale of goods whatever form it took."

"If a building contract was not split up into its component parts, that is to say, material and labour, in legislative practice relating to the ordinary regulation of sale of goods, there is no warrant for holding that it could not be so split up even for purposes of taxation."

Some High Courts accepted the decision in *Gannon Dunkerley's case*² and some others the decision in *Pandit Banaridas's case*³. In all these cases there were appeals to this Court. All these appeals were heard together. The leading judgment was delivered in *Gannon Dunkerley's case*². The Madras view was accepted and the view expressed in *Pandit Banaridas's case*³ was not accepted. It is contended for the appellants that this view of the Supreme Court controls the present case and it is therefore, necessary to follow the reasoning in some detail. Before I do so I shall refer to a case of the House of Lords which influenced in no small measure, the decision of this Court. That case is *Kirkness v. John Hudson & Co., Ltd.*⁴.

Under section 29 of the Transport Act, 1947 (10 & 11 Geo., C. 49) the company's railway wagons were vested on 1st January, 1948 in the British Transport Commission. These wagons were already under requisition to the Ministry of Transport under the powers contained in Regulation 53 of the Defence (General) Regulations, 1939. Later the company received compensation. This amount was higher than the written down value. A balancing charge of £29,021 was made under section 17 of the Income-tax Act, 1945 (8 & 9 Geo. 6, C. 32) in an assessment under clause 1 of Schedule D to the Income-tax Act, 1918. The company appealed against the balancing charge and succeeded. Section 17 (1) of the Income-tax Act, 1945 (which in its purport resembled section 10 (a) (vii) of the Indian Income-tax Act, 1922) ordained that a balancing charge or allowance should be made if

1. (1952) 2 M.L.J. 593 : A.I.R. 1953 Mad. 91.

2. (1954) 5 S.T.C. 216: (1955) 1 M.L.J. 87.

3. (1955) 6 S.T.C. 93.

4. L.R. (1955) A.C. 695.

certain events occurred, one such event being “(a) the machinery or plant is sold whether still in use or not.” The question was whether there was such a sale justifying a balancing charge. It was contended for the Revenue that the word ‘sale’ had a wider meaning than a contract and a conveyance of property and that in its legal meaning it did not involve a contract at all but just the transfer of the property in or ownership of something from A to B for a money price, whether voluntary or affected by operation of law or compulsory. Passages were cited from Benjamin on Sale (2nd Edition, page 1), Halsbury’s Laws of England (2nd Edition, Vol. 21, page 5), Blackstone’s Commentaries (19th Edition (1836), Vol. II, page 446), and Chalmer’s Sale of Goods (11th Edition, page 161) to show that a bargain only shows a mutual assent but it is the transfer of property which is the actual sale. Analogy of Lands Clauses Consolidation Act, 1845, Stamp Act and other Acts was invoked and later Finance Acts were also called in aid where such compulsory transactions were described as sale or purchase. The House of Lords by a majority of 4 to 1 overruled these contentions. It was held that the vesting of the wagons in the Transport Commission by operation of section 29 of the Transport Act and the payment of compensation in the shape of transport stock did not constitute a sale and the analogy of compulsory acquisition of land did not apply, since the procedure there was entirely different. The word ‘sale’ in section 17 of the Income-tax Act 1945, it was held, imported a consensual relation and the meaning of the section being plain, it was not possible to go to later Acts to construe the section. I shall quote a few passages from the speeches to show how this conclusion was reached so as to be able to show how the same reasoning was used in connection with the building contracts.

Viscount Simonds pointed out that what was to be construed were the two words ‘is sold’ in section 17 (1) (a) of the Income-tax Act, 1945, that there was nothing in the Act to give a special colour or meaning to the words and that analogous transactions could not help to decide what should be the meaning. Agreeing with Singleton, L.J., where he said “What would anyone accustomed to the use of the words ‘sale’ or ‘sold’ answer?” It seems to me that everyone must say “Hudsons did not sell”, Viscount Simonds went on to say :

“When Benjamin said in the passage quoted by Singleton and Birkett, L.JJ. from his well-known book On Sale 2nd ed, p. 1, that “by the common law” a sale of personal property was usually termed a ‘bargain and sale of goods’ he was by the use of the word ‘bargain’ perhaps unconsciously emphasizing that the consensual relation which the word ‘bargain’ imports is a necessary element in the concept. In this there is nothing new, the same principle is exhibited in Roman Law, for the opening words of Title 23 of the third book of the Institutes of Justinian “*De Imptione et venditione*” are “*emptio et vendi to contrahitur simulatque de pretio concenterit*”.....sometimes the contract for sale is itself the sale, as so often in the sale of goods ; sometimes, and particularly in the sale of land, it is regarded as a part of the sale as, for example, when it is said by a modern writer that “the first step in the sale of land is the contract for sale (see Cheshire, Modern Real Property, 7th Ed., p. 631). But it is immaterial whether the contract is regarded as the sale itself, or as a part of it, or step in, the sale or as a prelude to the sale ; there is for the present purpose no substance in any such distinction. The core of it is that the consensual relation is connoted by the simple word ‘sale’.”

Lord Reid also emphasised the consensual relation in ‘sale’ as its vital element and observed :—

“Sale, is, in my opinion, a *nomen juris*, it is the name of a particular consensual contract. The law with regard to sale of chattels or corporeal movables is now embodied in the Sale of Goods Act, 1893. By section 1 (1) “A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for money consideration, called the price,” and by section 1 (3) : “Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale ; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.” As a contract of sale, as distinct from an agreement to sell and unlike other contracts, operates by itself and without delivery to transfer the property in the thing sold, the word “sale” connotes both a contract and a conveyance or transfer of property.”

Lord Reid agreed

“that ‘sale’ is a word which has become capable in an appropriate context of having a meaning wider than its ordinary and correct meaning. But it is only permissible to give to a word some meaning other than its ordinary meaning if the context so requires.”

Lord Tucker in agreeing observed :

“I feel that the answers must be that the word is unambiguous and denotes a transfer of property in the chattel in question by one person to another for a price in money as the result of a contract express or implied. This is in substance the definition of “sale” given in the second edition of Benjamin

on Sale, but for present purposes it is sufficient to emphasize that natural assent is an essential element in the transaction. It is no doubt true that the contract or agreement to sell may precede the formal instrument or act of delivery under which the property passes, but to describe a transfer of property in a chattel which takes place without the consent of transferor and transferee as a sale would seem to me a misuse of language. By express enactment or by necessary implication from the context any word may be given a meaning different from or wider than that which it ordinarily bears, and this may apply to the word "sale" where it appears in a context relating to the process of compulsory acquisition of land....."

I do not find it necessary to quote from the minority view of Lord Morton of Henryton but he did point out that the word 'sale' for 100 years was being used in connection with transactions by which the property of A had been transferred to B, on payment of compensation to the owner but without the consent of the owner and said of the question posed by Singleton, L.J., that if it were put to ten persons unconnected with the company, five of them might say "No, the wagons were taken over under the Transport Act" and the other five might say, "Yes" adding, possibly "but it was a compulsory sale" or "because they had to do it."

I have paused long over this case but only because the line of reasoning of this case has been closely followed in *Gannon Dunkerley's case*¹. The decision of the Court of Appeal, later approved by the House of Lords, had also influenced in a large measure the decision of the Madras High Court earlier in the same case.

In *Gannon Dunkerley's case*¹, Venkatarama Aiyar, J., posed the question thus :

"The sole question for determination in this appeal is whether the provisions of the Madras General Sales Tax Act are *ultra vires*, in so far as they seek to impose a tax on the supply of materials in execution of works contract, treating it as a sale of goods by the contractor and the answer to it must depend on the meaning to be given to the words "sale of goods" in Entry 48 in List II of Schedule VII of the Government of India Act, 1935."

His Lordship accepted that building materials were 'goods' in view of the definition and narrowed the inquiry to whether there was "a sale of those materials within the meaning of that word in Entry 48". The learned Judge then pointed out that in interpreting a Constitution a liberal spirit should inspire Courts and the widest amplitude must be given to the legislative entries and they should not be cut down by resort to legislative practice and that subjects of taxation in particular should be taken in *rerum natura* irrespective of previous laws on the subject. The learned Judge next asked the question in what sense the words 'sale of goods' were used, "whether popular or legal, and what its connotation is either in the one sense or the other." After noticing meanings of "sale" as given by diverse authors, it was laid down that it meant transfer of property in a thing from one person to another for a money price. It was next pointed out that in the popular sense a sale "is said to take place when the bargain is settled between the parties, though property in the goods may not pass at that stage" and the observations of Sankey, J. (later Viscount Sankey, L.C.) in *Neville Reid & Co., Ltd. v C.I.R.*,² that the word 'sale' in the British Finance Act, 1918 should not be construed in the light of the Sale of Goods Act, 1893 but in a commercial and business sense, were rejected as *obiter* and opposed to the decisions of this Court in *Poppatlal Shah's case*³ and *Budh Prakash case*⁴, where "executory agreements" were not held to be sales within the Entry. It was observed—"We must accordingly hold that the expression 'sale of goods' in Entry 48 cannot be construed in its popular sense and that it must be interpreted in its legal sense. What its connotation in that sense is must now be ascertained. For a correct determination it is necessary to digress somewhat into the evolution of the law relating to sale of goods."

The learned Judge next referred to Roman Law of *emptio venditio* and pointed out that the consideration of sale could not be anything but only money or something valuable and that it was so recorded in the Institutes of Justinian Title XXIII and that *emptio venditio* was a consensual contract. The learned Judge next referred to Benjamin on Sale and observed that according to that learned author to constitute a *valid sale* there must be a concurrence of the following elements, *viz.*,—

1. (1954) 5 S.T.C. 216.

2. 12 Tax Case 545.

3. (1952) 2 M.L.J. 593 : A.I.R. 1953 Mad. 91.

4. (1954) S.C.J. 573; (1954) 2 M.L.J. 124 : (1955) 1 S.C.R. 243.

"(1) Parties competent to contract ; (2) mutual assent ; (3) a thing , the absolute or general property in which is transferred from the seller to the the buyer ; and (4) a price in money paid or promised." (*Vide* 8th edn., p. 2).

"In 1893 the Sale of Goods Act, 56 & 57 Vict. c. 71 codified the law on the subject and section 1 of the Act which embodied the rules of the common law runs as follows :

1. (1)—"A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale ; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

It was then pointed out that in section 77 of the Indian Contract Act, 1872 "sale" was defined as "the exchange of property for a price involving the transfer of ownership of the thing sold from seller to buyer." It was then held that in view of the scheme of the Indian Contract Act sections 1-75 a bargain was an essential element and that even after the Indian Sale of Goods Act the position had not changed. It was next pointed out that

"Thus, if merely title to the goods passed but not as a result of any contract between the parties, express or implied, there is no sale. So also if the consideration for the transfer was not money but other valuable consideration, it may then be exchange or barter but not sale. And if under the contract of sale, title to the goods has not passed, then there is an agreement to sell and not a completed sale."

The State in the case urged four points to resist the conclusion that the words "sale of goods" in Entry 48 must be interpreted in the sense which they bear in the Indian Sale of Goods Act, 1930. These contentions were examined seriatim and rejected and it was concluded thus :

"To sum up, the expression "sale of goods" in Entry 48 is a *nomen juris*, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case one entire and indivisible—and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale."

In so far as building contracts were concerned two reasons why there could not be a sale of goods were mentioned. The first was that there was no agreement express or implied to sell 'goods.' It was observed :

".....We are concerned here with a building contract, and in the case of such a contract, the theory that it can be broken up into its component parts and as regards one of them it can be said that there is a sale must fail both on the grounds that there is no agreement to sell materials as such, and that property in them does not pass as movables."

The second reason was that the property in the building materials does not pass in the materials regarded as 'goods' but as part of immovable property. It was observed :—

"When the work to be executed is, as in the present case, a house, the construction imbedded on the land becomes an accretion to it on the principle *quicquid plantatur solo, solo cedit* and it vests in the other party not as a result of the contract but as the owner of the land."

I shall refer to two other cases which were decided with *Gannon Dunkerley's case*¹. In *Pandit Banarsi Das v. State of Madhya Pradesh*², it was observed at page 437—

"It should be made clear, however, in accordance with what we have already stated, that the prohibition against imposition of tax is only in respect of contracts which are single and indivisible and not of contracts which are a combination of distinct contracts for sale of materials and for work, and that nothing that we have said in this judgment shall bar the Sales Tax Authorities from deciding whether a particular contract falls within one category or the other and imposing a tax on the agreement of sale of materials, where the contract belongs to the latter category."

In *Mithanlal v. State of Delhi*³, from a composite transaction involving work and materials, the materials were held liable to sales-tax under a law made by

1. (1959) S.C.J. 695 ; (1959) 21 M.L.J. (S.C.) 66 ; (1959) 2 An.W.R. (S.C.) 66.

2. (1959) S.C.R. 427 (437).

3. (1958) S.C.J. 699 ; (1959) S.C.R. 445.

Parliament for a Part C State. This was held to fall within the residuary powers of Parliament without any specific reference to any particular entry or entries in Legislative Lists. I shall now proceed to discuss the facts of the present case in relation to the decisions on Entry 48 of List II, Seventh Schedule of the Government of India Act, 1935.

Before considering the facts of this case in the light of the Sugar and Sugar Products Order, 1946, I shall summarise what I have said so far. Sales-tax is a tax which may be laid on goods or services. It assumes numerous shapes and forms. It is a modern tax being the product of the First World War. The concept of 'sale' is of course much older and even the English Sale of Goods Act, 1893 on which our own statute is based, was prior to the first imposition of tax in modern times. In India, the tax was first levied in 1937 under laws made under Entry No. 48 which read — "Taxes on the sale of goods." It was introduced as the main source of revenue to the Provinces under a scheme of Provincial Autonomy. Being a commodity tax it came into competition with other commodity taxes like excise but it was held that the entry comprised, wholesale, or retail and turnover taxes from the stage of manufacture or production to consumption. Later textual interpretation based on statutes relating to sale of goods and books on the subject of sale, pointed out intrinsic limitations. One such limitation was that the term 'sale' was used in the limited sense it bears in that part of the law of contract which is now incorporated in the Sale of Goods Act. As a result of this fundamental consideration 'forward contracts' were held to be outside the scope of the Entry. The sale, it was held, had to be a completed sale with passing of property before the tax could become payable. A further limitation was pointed out in certain cases relating to building contracts in which it was held that though property in materials passed, it did so without an agreement, express or implied, in that behalf, and only when the materials ceased to be goods and became immovable property. It was held that the supremacy of the Provincial Legislatures did not extend to levying a tax on sales in these circumstances by modifying the definition of sale. It was however held that if the parties agreed to divide a works contract into labour plus materials, the tax might be leviable. It was also held that a tax on building materials was leviable by the Legislature having power to levy a tax not expressly mentioned. It was, however, held that if the taxing Province had the goods at the time of the contract or there was other substantial connection with the contract by reason of some element having taken place there, the Legislature could validly make a law which treated the whole transaction as having taken place in the Province.

The argument in this case is that the tax can only be placed upon a transaction of sale which is the result of mutual assent between the buyer and seller and observations in *Gannon Dunkerley's case*,¹ where stress is laid upon the consensual aspect of 'sale' are relied upon. It is true that consent makes a contract of sale because sale is one of the four consensual contracts recognised from early times. "*Consensu fiunt obligationes in emptionibus venditionibus*" and "*Ideo autem istis modis consensu dicimus obligationes contrahi*". But consent may be express or implied and it cannot be said that unless the offer and acceptance are there in an elementary form there can be no taxable sale. The observations in *Gannon Dunkerley's case*¹ were made in connection with materials utilised in the construction of buildings, roads, bridges, etc. It was there pointed out that there must at least be an agreement between the parties, express or implied, in respect of some 'goods' as 'goods' and the levy of the tax on building materials was struck down because "there is no agreement to sell materials as such, and that property in them does not pass as movables."

The commodity with which we are concerned is sugar and it is delivered as sugar. Thus one part of the reasoning from *Gannon Dunkerley's case*¹ which rested on the passing of property in building materials as a part of realty does not apply. It is also quite clear that the tax is being demanded after the sugar has changed

1. (1958) S.C.J. 696 : (1958) 2 M.L.J. (S.C.) 66 : (1958) 2 An.W.R. (S.C.) 66.

hands or expressing it in legal phrase when property in it has passed. It is argued that by reason of the Control Order there was no bargaining. It is pointed out that the control of sugar operated to fix ex-factory price, to determine who should be the supplier and who should receive the supply, to fix the quantity, quality and the time of delivery. The question which we are deciding is not a question arising under the Sale of Goods Act but under a taxing entry in a Constitution. The entry described a source of revenue to the Provinces. The Provincial Legislature made its laws taxing sales of commodities like sugar. In a period of emergency the Federal Government imposed certain controls to regulate prices and supplies. This control involved a permit system under which every Province had to indent its requirements to the Controller and every sugar mill had to inform the Controller of the existing and future stocks. What the Controller did was to permit a particular mill to supply sugar of a stated quality and quantity to a named Province. The mill then had to send the sugar on pain of prosecution and forfeiture and receive price according to the fixed rates. Bargaining, it is said, was not possible but bargaining in the sense of offer and acceptance may be express or implied. That after the permit was obtained the two parties agreed to 'sell and purchase' sugar admits of no doubt.

I shall now analyse the whole transaction and see how the element of compulsion and control affect the existence of a sale. First there is the fixation of price by the Controller. Can it be said that there is no sale because the price is fixed by a third person and not by the buyer and seller? This is the old controversy between Labeo and Proculus that if price is fixed by a third person a contract of sale results or not. Labeo with whom Cassius agreed, held that there was not, while Proculus was of the contrary opinion :

"Pre tunc autem certum esse debet. Nam aliquis si ita inter nos convenerit. Ut quanti Titius rem cesterit, tanti sit emptor, Labeo negavit ullam vim hoc negotium habere, cuius opinionem Cassius probat. Ofilius et eam emptionem et venditionem ; cuius opinionem Proculus secutus est."

(*Gaius III, 140*)

This was solved by Justinian holding that there was :

"Sed nostra decisio ita hoc constituit."

(*Inst. III, 23, 1*).

I do not think the modern law is any different. So long as the parties trade under controls at fixed price and accept these as any other law of the realm because they must, the contract is at the fixed price both sides having or deemed to have agreed to such a price. Consent under the law of contract need not be express, it can be implied. There are cases in which a sale takes place by the operation of law rather than by mutual agreement express or implied. See Benjamin on Sale (8th Edn., p. 91). The present is just another example of an implied contract with an implied offer and implied acceptance by the parties. What I have said about price applies also to quantity and quality. The Entry in No. 48 of List II, Seventh Schedule dealt with sale of goods in all its forms. We have seen above how numerous are these forms. The entry was expressed in six simple words but was meant to include a power to tax sale of goods in all its forms. It was not meant to operate only in those elementary cases where there is an offer by A and an acceptance by B with the price as consideration. The concept of taxes on sale of goods is more complicated and the relations of people do not always take elementary forms. When the Province after receiving the permit telegraphed instructions to despatch sugar and the mill despatched it, a contract emerged and consent must be implied on both sides though not expressed antecedently to the permit. The indent of the Province was the offer to purchase sugar of such and such quality and quantity. The mills by quoting their stocks offered to sell sugar. The Controller brought the seller and purchaser together and gave them his permission with respect to a particular quantity and quality. There was thus an implied contract of sale in the words of the Digest (XLI, I, IX, 4) :

"Si cui libera imperatoria negotiorum administratio a domino parata fuerit, iure ex his negotiis rem reddendi facit eam emptoribus."

No doubt, there is compulsion in both selling and buying, perhaps more for the mills than for the Provinces. But a compelled sale is nevertheless a sale as was held by the House of Lords in *New Castle Breweries v. Inland Revenue Commissioner*¹. The case in *Kirkness v. John Hudson & Co., Ltd.*², was different because the section there interpreted required a 'sale' and there was no sale express or implied when the wagons were taken away and compensation was paid in the shape of transport stock. There a sale in its ordinary form was obviously meant though it was recognised that 'sale' in other context has other meanings.

It was argued that there must be mutuality. That one party must be free to offer and must offer and the other side must be free to accept and must accept the offer before a sale can be said to arise. But sales often take place without volition of a party. A sick man is given medicines under the orders of his doctor and pays for them to the chemist with tax on the price. He does not even know the names of the medicines. Did he make an offer to the chemist from his sick bed? The affairs of the world are very complicated and sales are not always in their elementary forms. Due to short supply or maldistribution of goods, controls have to be imposed. There are permits, price controls, rationing and shops which are licensed. Can it be said that there is no sale because mutuality is lost on one account or another? It was not said in the *Tata Iron and Steel case*³, which was a case of control, that there was no sale. The entry should be interpreted in a liberal spirit and not cut down by narrow technical considerations. The entry in other words should not be shorn of all its content to leave a mere husk of Legislative power. For the purposes of legislation such as on sales tax it is only necessary to see whether there is a sale express or implied. Such a sale was not found in "forward" contracts and in respect of materials used in building contracts. But the same cannot be said of all situations. I for one would not curtail the entry any further. The entry has its meaning and within its meaning there is a plenary power. If a sale express or implied is found to exist then the tax must follow. I am of the opinion that in these transactions there was a sale of sugar for a price and the tax was payable. I would, therefore, dismiss these appeals with costs.

The Court made the following

ORDER :—Having regard to the judgment of the majority, all these appeals (Nos. 237 and 633 to 636 of 1961) would be allowed with costs—one hearing fee.

V.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

PRESENT:—P. B. GAJENDRAGADKAR, Chief Justice, K. N. WANCHOO, J. C. SHAH, N. RAJAGOPALA AYYANGAR AND S. M. SIKRI, JJ.

The Tata Engineering and Locomotive Co., Ltd.
and others

.. Petitioners*

v.

The State of Bihar and others

.. Respondents.

The Advocate-General for the State of Madras

.. Intervener.

Constitution of India (1950), Articles 32 and 19—Company registered under the Companies Act (VII of 1913) —Is not a citizen entitled to fundamental rights for infraction of which a petition under Article 32 will lie—Doctrines of piercing the veil of Corporation—If can be invoked on the ground that fundamental rights of shareholders are infringed—Finding of Sales Tax Officers in regard to character of impugned sale transactions (that they are intra-State)—Decision if can be attacked by a petition under Article 32 as contravening fundamental rights.

Companies Act (VII of 1913)—Company registered under—Not a citizen entitled to fundamental rights for infraction of which a petition under Article 32 of the Constitution will lie—Individual shareholders—If can maintain such a writ petition.

Broadly stated, where fraud is intended to be prevented, or trading with the enemy is sought to be defeated, the veil of a Corporation is lifted by judicial decisions and the shareholders are held to be

1. (1927) 96 L.J. K.B. 735.

3. (1958) S.C.J. 818.

2. L.R. (1955) A.C. 696.

* W.P. Nos. 112, 113 and 202 to 204 of 1961,
79 and 80 of 1962.

the persons who actually work for the Corporation. But where State Trading Corporations or companies registered under the Indian Companies Act file Writ Petitions under Article 32 of the Constitution of India complaining against levy of sales-tax on transactions which were said to be intra-State sales which did not fall under Article 286 (1) the Court cannot lift the veil of the petitioners and say that it is the shareholders who are really moving the Court under Article 32. What the Corporations or the companies cannot achieve directly cannot be achieved by them indirectly by relying upon the doctrine of lifting the veil. If the Corporations and companies are not citizens, it means that the Constitution intended that they should not get the benefit of Article 19. The effect of confining Article 19 to citizens as distinguished from persons to whom the Article like 14 apply clearly must be that it is only citizens to whom the rights under Article 19 are guaranteed. If the Legislature intends that the benefit of Article 19 should be made available to the Corporations it would not be difficult for it to adopt a proper measure in that behalf by enlarging the definition of "citizen" prescribed by the Citizenship Act passed by the Parliament by virtue of the powers conferred on it by Articles 10 and 11.

In view of the decision in the case of *State Trading Corporation of India, Ltd. v. C.T.O. and others*, (1953) 2 S.C.J. 605 : (1963) 2 Comp.L.J. 234, the petitioners (corporations and companies) cannot be heard to say that their shareholders should be allowed to file the petitions on the ground that, in substance, the corporations and companies are nothing more than associations of shareholders and members thereof.

The fundamental right to form an association (Article 19 (1) (c)) cannot be coupled with the fundamental right to carry on any trade or business. Article 19 as contrasted with certain other Articles like Articles 26, 29 and 30 guarantees right to citizens as such, and associations cannot lay claim to the fundamental rights guaranteed by that Article solely on the basis of their being an aggregation of citizens, that is to say, the right of the citizens composing the body. Once a company or a corporation is formed, the business which is carried on by the said company or corporation is the business of the company or corporation and is not the business of the citizens who get the company or corporation formed or incorporated, and the rights of the incorporated body must be judged on that footing and cannot be judged on the assumption that they are the rights attributable to the business of individual citizens.

Quere.—Whether, where the Sales Tax Authorities have, during the course of the assessment proceedings, come to the conclusion that the impugned transactions are intra-State sales and do not fall under Article 286 (1), such decision even if erroneous can be said to contravene the fundamental rights of a citizen which would justify recourse to Article 32?

Petitions under Article 32 of the Constitution of India for enforcement of Fundamental Rights.

N. A. Palkhivala, Senior Advocate, (*J. B. Dadachanji, O. C. Mathur and Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Petitioners in W.P. Nos. 112 and 113 of 1961 and 79 to 80 of 1962.

M. C. Setalvad, Senior Advocate, (*D. P. Singh, M. K. Ramamurthi, R. K. Garg and S. C. Agarwal*, Advocates of *M/s. Ramamurthi & Co.*, with him), for Respondents in W.P. Nos. 112 and 113 of 1961.

S. V. Gupte, Additional Solicitor-General of India and *N. S. Bindra*, Senior Advocate, (*R. H. Dhebar*, Advocate, with them), for Respondents in W.P. Nos. 79 and 80 of 1962.

G. S. Pathak, Senior Advocate, (*B. Dutta*, Advocate and *J. B. Dadachanji, O. C. Mathur and Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Petitioners in W.P. Nos. 202 to 204 of 1961.

A. Ranganadham Chetty, Senior Advocate, (*T. V. R. Tatachari*, Advocate, with him), for Respondents in W.P. Nos. 202 and 203 of 1961.

Lal Narain Sinha, Senior Advocate, (*D. P. Singh, M. K. Ramamurthi, R. K. Garg and S. C. Agarwal*, Advocates of *M/s. Ramamurthi & Co.*, with him), for Respondent in W.P. No. 204 of 1961.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—These Writ Petitions have been placed for hearing before us in a group, because they raise a common question of law in regard to the validity of the demand for sales tax which has been made against the respective petitioners by the Sales Tax Officers for different areas. The facts in respect of each one of the Writ Petitions are not the same and the years for which the demand is made are also different ; but the pattern of contentions is uniform and the arguments urged in each one of them are exactly the same. Broadly stated, the case for the petitioners is that the appropriate authorities purporting to act under the different Sales Tax Acts

are attempting to recover from the petitioners sales tax in respect of transactions to which the petitioners were parties, though the said transactions are not taxable under Article 286 of the Constitution. Article 286 (1) (a) provides that no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place outside the State; and the argument is that the sales in question are all sales which took place outside the State and as such, are entitled to the protection of Article 286 (1) (a). The Authorities under the respective Sales Tax Acts have rejected the petitioners' contention that the transactions in question are inter-State sales and have held that Article 286 (1) (a) is not applicable to them. A similar finding has been recorded against the petitioners under Article 286 (2). The petitioners' grievance is that by coming to this erroneous conclusion, a tax is being levied against them in respect of transactions protected by Article 286 (1) (a) and that constitutes a breach of their fundamental rights under Article 31 (1). It is this alleged infringement of their fundamental rights that they seek to bring before this Court under Article 32 (1). It has been urged on their behalf that the right to move this Court under Article 32 (1) is itself a fundamental right, and so, under Article 32 (2) an appropriate order should be passed setting aside the directions issued by the Sales Tax Authorities calling upon the petitioners either to pay the sales-tax, or to comply with other directions issued by them in that behalf.

For dealing with the points raised by these Writ Petitions, it is not necessary to set out the facts in respect of each one of them. For convenience we will refer to the facts set out by the Tata Engineering and Locomotive Co., Ltd., the petitioner in W.Ps. Nos. 112 and 113 of 1961. The petitioner is a company registered under the Indian Companies Act, 1913, and carries on the business of manufacturing, *inter alia*, Diesel truck and bus chassis and the spare parts and accessories thereof at Jamshedpur in the State of Bihar. The company sells these products to dealers, State Transport Organisations and others doing business in various States of India. The registered office of the petitioner is in Bombay. In order to promote its trade throughout the country, the petitioner has entered into Dealership Agreements with different persons. The modus adopted by the petitioner in carrying on its business in different parts of India is to sell its products to the dealers by virtue of the relevant provisions of the Dealership Agreements. Accordingly, the petitioner distributes and sells its vehicles to dealers, State Transport Organisations and consumers in the manner set out in the petition. The petitioner contends that the sales in respect of which the present petitions have been filed were effected in the course of inter-State trade and as such, were not liable to be taxed under the relevant provisions of the Sales Tax Act. The Sales Tax Officer, on the other hand, has held that the sales had taken place within the State of Bihar and were intra-State sales and as such, were liable to assessment under the Bihar Sales Tax Act. In accordance with this conclusion, further steps are threatened against the petitioner in the matter of recovery of the sales tax calculated by the appropriate authorities. The petitioner is a company and a majority of its shareholders are Indian citizens, two of whom have joined the present petitions.

The petitioners in W.Ps. Nos. 79 and 80 of 1962 are the Automobile Products of India, Ltd., and another. The majority of the shareholders of this company are also citizens of India and one of them has joined the petitions.

Writ Petitions Nos. 202-204 of 1961 have been filed by the State Trading Corporation of India, Ltd. The shareholders of this Corporation are the President of India, and two Additional Secretaries, Ministry of Commerce and Industry, Government of India; one of these Secretaries has joined the petitions. It may incidentally be stated at this stage that these Writ Petitions were heard by a Special Bench of this Court on the 26th July, 1963, in order to determine the constitutional question as to whether the State Trading Corporation, Ltd., can claim to be a citizen within the meaning of Article 19 of the Constitution. The majority decision rendered in these Writ Petitions on the preliminary issue referred to the Special Bench was that the petitioner as a State Trading Corporation is not a citizen under Article 19, and so, could not claim the protection of the fundamental rights guaranteed by the said Article

(vide *State Trading Corporation of India, Ltd. v. The Commercial Tax Officer and others*¹, That is why this petitioner along with other petitioners have made the petitions in the names of the companies as well as one or two of their shareholders respectively. It is argued on behalf of the petitioners that though the company or the Corporation may not be an Indian citizen under Article 19, that should not prejudice the petitioners' case, because, in substance, the Corporation is no more than an instrument or agent appointed by its Indian shareholders and as such, it should be open to the petitioners either acting themselves as companies or acting through their shareholders to claim the relief for which the present petitions have been filed under Article 32.

These petitions are resisted by the respective States on the ground that the petitions are not competent under Article 32. The respondents contend that the main attack of the petitioners is against the findings of the Sales Tax Officers in regard to the character of the impugned sale transactions and they urged that even if the said findings are wrong, that cannot attract the provisions of Article 32. The validity of the respective Sales Tax Acts is not challenged and if purporting to exercise their powers under the relevant provisions of the said Acts, the appropriate authorities have, during the course of the assessment proceedings, come to the conclusion that the impugned transactions are intra-State sales and do not fall under Article 286 (1) (a), that is a decision which is quasi-judicial in character and even an erroneous decision rendered in such assessment proceedings cannot be said to contravene the fundamental rights of a citizen which would justify recourse to Article 32. In other words, the alleged breach of the petitioners' fundamental rights being referable to a quasi-judicial order made by a Tribunal appointed under a valid Sales Tax Act, does not bring the case within Article 32. That is the first preliminary ground on which the competence of the Writ Petitions is challenged. In support of this plea, reliance is placed by the respondents on a recent decision of a Special Bench of this Court in *Smt. Ujjam Bai v. State of Uttar Pradesh*².

There is another preliminary objection raised by the respondents against the competence of the Writ Petitions, and that is based upon the decision of this Court in the case of the *State Trading Corporation of India, Ltd.*¹ It is urged that the decision of this Court that the State Trading Corporation is not a citizen, necessarily means that the fundamental rights guaranteed by Article 19 which can be claimed only by citizens cannot be claimed by such a Corporation, and so, there can be no scope for looking at the substance of the matter and giving to the shareholders indirectly the right which the Corporation as a separate legal entity is not directly entitled to claim. The respondents have urged that in dealing with the plea of the petitioners that the veil worn by the Corporation as a separate legal entity should be lifted and the substantial character of the Corporation should be determined without reference to the technical position that the Corporation is a separate entity, we ought to bear in mind the decision of this Court in the case of the *State Trading Corporation of India, Ltd.*¹ Basing themselves on this contention, the respondents have also argued that if the fundamental rights guaranteed by Article 19 are not available to the petitioners, then their plea that the sales tax is being collected from them contrary to Article 31 (1) must fail and in support of this contention reliance is placed upon a recent decision of this Court in the case of *Indo-China Steam Navigation Co., Ltd. v. The Additional Collector of Customs and others*.³

Logically, the second preliminary objection would come first, because if the petitioners cannot claim the status of citizens and are not, therefore, entitled to base their petitions on the allegation that their fundamental rights under Article 19 have been contravened, that would be the end of the petitions. It has been conceded before us by all the learned Counsel appearing for the petitioners that it is only if both the preliminary objections raised by the respondents are overruled that the

1. (1963) 2 Comp.L.J. 234 : (1963) 2 S.C.J. 1621.
605.

2. (1963) 1 S.C.R. 778 : A.I.R. 1962 S.C.

3. (1964) 34 Comp. Cas. 435.

hearing of the Writ Petitions would reach the stage of considering the merits of their pleas that the sales which are sought to be taxed fall under Article 286 (1) (a) of the Constitution. If the respondents succeed in either of the two preliminary objections raised by them, the Writ Petitions would fail and there would be no occasion to consider the merits of the pleas raised by them. Since we have come to the conclusion that the second preliminary objection raised by the respondents must be upheld, we do not propose to pronounce any decision on the first preliminary objection. However, as the point covered by the said objection has been elaborately argued before us, we would prefer to indicate briefly the broad arguments urged by both the parties in that behalf.

The controversy between the parties as to the scope and effect of the provisions contained in Article 32 on which the validity of the first preliminary objection rests, substantially centers round the question as to what is the effect of the decision of this Court in *Smt. Ujjam Bai's Case*¹. The petitioners argue that though the majority view in that case was that the Writ Petition filed by Ujjam Bai was incompetent, it would appear that the reasons given in most of the judgments support the petitioners' case that where the fundamental rights of a citizen are contravened, may be by a quasi-judicial order, in pursuance of which a tax is attempted to be recovered from a citizen, the erroneous conclusion in regard to the nature of the transaction must be held to contravene the fundamental rights of the citizens and as such, would justify the petitioners in moving this Court under Article 32.

On the other hand, the respondents urge that the effect of the decision in *Ujjam Bai's Case*¹, plainly tends to show that if a quasi-judicial decision has determined a matter in regard to the taxability of a given transaction, there can be no question about the breach of fundamental rights which would justify an application under Article 32. The argument is that the intervention of quasi-judicial order changes the complexion of the dispute between the parties, and in cases of that character, the only remedy available to an aggrieved citizen is to take recourse to the appeals and other proceedings prescribed by the taxing statute in question. Article 32 is not intended to confer appellate jurisdiction on this Court so as to review or examine the propriety of quasi-judicial orders passed by appropriate authorities purporting to exercise their powers and jurisdictions under the several taxing statutes. It may be that after exhausting the remedies by way of appeals and revisions prescribed by the statute, the party may come to this Court under Article 136, but Article 32 is inapplicable in such cases.

In *Ujjam Bai's Case*¹, the first issue which was referred to the Special Bench was whether an order of assessment made by an authority under a taxing statute which is *intra vires* is open to challenge as repugnant to Article 19 (1) (g), on the sole ground that it was based on a misconstruction of a provision of the Act or of a notification issued thereunder; and the second question was, can the validity of such an order be questioned in a petition under Article 32 of the Constitution? The majority view expressed in this case was against the petitioner. S. K. Das, J., who delivered the main judgment on behalf of the majority view observed that where a quasi-judicial authority makes an order in the undoubted exercise of its jurisdiction in pursuance of a provision of law which is *intra vires*, an error of law or fact committed by that authority cannot be impeached otherwise than on appeal, unless the erroneous determination relates to a matter on which the jurisdiction of that body depends; and so, he held that if the impugned order of assessment is made by an authority under a valid taxing statute in the undoubted exercise of its jurisdiction, it cannot be challenged under Article 32 on the sole ground that it is passed on a misconstruction of a provision of the Act or of a notification issued thereunder.

Subba Rao, J., on the other hand, took the view that Article 32 confers wide jurisdiction on this Court to enforce the fundamental rights, and he held that it is the duty of this Court to entertain a Writ Petition wherever a fundamental right of a citizen is alleged to have been contravened, irrespective of whether the question raised

involves a question of jurisdiction, law, or fact ; this is the minority view pronounced in *Ujjam Bai's Case*¹.

Hidayatullah, J., who agreed broadly with the majority view, expressed the opinion that if a quasi-judicial tribunal embarks upon an action wholly outside the pale of the law he is enforcing, a question of jurisdiction would be involved and that would justify an application under Article 32.

Ayyangar, J., held that if it appeared that the impugned order of assessment was based upon a plain and patent misconstruction of the provisions of the taxing statute, that itself would give rise to a plea that the authority was acting beyond its jurisdiction and in such a case, a petition under Article 32 may be justified. Proceeding on this view, the learned Judge held that the construction placed by the taxing authority was not shown to be patently erroneous, and so, he was not prepared to grant any relief to *Ujjam Bai*. That is how the learned Judge agreed with the majority decision.

Mudholkar, J., who also agreed with the majority decision, was disposed to make an exception in cases where an erroneous construction of the law would lead to the recovery of a tax which is beyond the competence of the Legislature, or is violative of the provisions of Part III or of any other provisions of the Constitution.

It would, thus, be seen that though the majority decision was that *Ujjam Bai's* petition should be dismissed, the reasons given in the judgments pronounced by the learned Judges who agreed with the majority decision are not all uniform and do not disclose an identity of approach or of reasons, and that naturally has given rise to the arguments in the present Writ Petitions, both parties suggesting that the majority decision in the case of *Ujjam Bai* supports the rival views for which they contend.

Mr. Setalvad has strongly urged that if a misconstruction of the notification on which *Ujjam Bai* rested her case, was not held to justify a petition under Article 32, that would necessarily mean that the misconstruction of the nature of the transaction would be no better, even though in this latter case the wrong decision on the question as to the character of the sale transaction may involve taxing a transaction which is protected by Article 286 (1) (a). One can understand the argument, said Mr. Setalvad, that a breach of the fundamental rights, however it is caused would justify recourse to Article 32 ; that would be consistent and logical ; but once it is held that a breach of the fundamental rights alleged to have been caused by a misconstruction of a notification or a statute placed by an appropriate authority acting under the provisions of a valid taxing law does not attract Article 32, it is not logically possible to urge that another kind of breach alleged to have been caused by a misappreciation of the nature of the transaction and an erroneous conclusion as to its taxable character would make any difference. In the first case, the erroneous construction of the notification violates the provisions of Article 265 of the Constitution and thereby brings in the breach of Article 31 (1) ; in the other case, the misconstruction as to the taxable character of the transaction violates Article 286 (1) ((a) and thereby brings in Article 31 (1). Therefore, it is urged that the necessary consequence of the decision in *Ujjam Bai's Case*¹, is that even if the Sales Tax Officer has held wrongly that the impugned transactions are not inter-State transactions, the remedy of petition under Article 32 is not open to the aggrieved citizen.

On the other hand, Mr. Palkhivala has strenuously urged that the decision in *Ujjam Bai's Case*¹, rested on the basis that the misinterpretation of the notification did not involve the violation of any constitutional limitations or prohibitions and he has referred us to some passages in the judgments of Das, Kapur and Mudholkar, JJ. In support of his argument that where an erroneous decision of a Sales Tax Officer results in the violation of a constitutional prohibition or limitation, different considerations, would arise and an aggrieved citizen would be entitled to move this

Court under Article 32. Mr. Palkhivala has emphasised the fact that whereas Das, J. expressly held that the view taken in *Kailash Nath v. State of U.P.*¹, was not right, he approved of the other decisions which were cited at the Bar and exhaustively discussed on the ground that those decisions "fall under the category in which an executive authority acts without authority of law, or a quasi-judicial authority acts in transgression of a constitutional prohibition and without jurisdiction". (p. 842). These decisions are : *Thakur Amar Singhji v. State of Rajasthan*², *M/s. Mohanlal Hargovind Das v. The State of Madhya Pradesh*³; *Y. Mahoob Sheriff v. Mysore State Transport Authority*⁴; *J. V. Gokar & Co. (Private), Ltd. v. The Assistant Collector of Sales Tax (Inspection)*⁵ and *Universal Imports Agency v. Chief Controller of Imports and Exports*⁶. To the same effect is the observation made by Kapur, J., when the learned Judge stated that in the case of *M/s. Mohanlal Hargovind Das*³, the dispute did not turn upon a misconstruction of any statute by any quasi-judicial authority, but that was a case in which the very transaction was outside the taxing powers of the State and any action taken by the taxing authorities was one without authority of law.

In support of the same argument, both Mr. Pathak and Mr. Palkhivala strongly relied upon the two subsequent decisions of this Court where Writ Petitions filed under Article 32 were entertained on grounds somewhat similar to those on which the present Writ Petitions are founded, *The State Trading Corporation of India, Ltd. and another v. The State of Mysore and another*⁷ and *The State Trading Corporation of India Ltd., and others v. The State of Mysore and another*⁸.

Basing himself on these decision, Mr. Pathak has argued that the question as to whether a particular transaction of sale attracts the protection of Article 286 (1) (a) is a collateral fact the decision of which confers jurisdiction on the Sales Tax Officer; and he contends that the decision of the Sales Tax Officer, who is a Tribunal of limited jurisdiction, on a collateral jurisdictional point can always be challenged under Article 32 of the Constitution if the said decision impinges upon the citizen's right protected by Article 286 (1) (a).

Mr. Palkhivala urged the argument of jurisdiction in a slightly different way. He contended that the concept of jurisdiction on which he relied was not based on the view that jurisdiction means authority to decide. According to him the concept of jurisdiction was of a different category and was of a vital character when constitutional limitations or prohibitions were involved in the decision of any case brought before a Sales Tax Officer.

On the other hand, Mr. Setalvad has urged that the Sales Tax Officer is not a Tribunal of limited jurisdiction and the charging sections of the respective Sales Tax Acts leave it to the Sales Tax Officer and the hierarchy of officers contemplated by them to decide the question about the taxability of any given transaction and impose a tax on it in accordance with the provisions of the Acts. Where a tribunal is entitled to deal with transactions which fall under the charging sections of the statute, it would be erroneous to contend that the decision of the Tribunal on the said question about the taxability of the transaction is the decision on a collateral jurisdictional fact. If the said argument is accepted, logically, it may mean that all questions the decision of which inevitably precedes the imposition of the tax, would be collateral jurisdictional facts; and that clearly cannot be the effect of the charging sections of the different Acts.

In regard to the point of constitutional limitations and prohibitions raised by Mr. Palkhivala, Mr. Setalvad contends that if the provisions of Article 286 (1) (a) makes the decision of the Sales Tax Officer on the character of the sale transaction one of jurisdiction, then it is difficult to see why his decision on other points should

1. (1957) 8 S.T.C. 358 : A.I.R. 1957 S.C. 790.

2. (1955) S.C.J. 523 : (1955) 2 S.C.R. 303.

3. (1955) 2 S.C.R. 506.

4. (1960) S.C.J. 402 : (1960) 2 S.C.R. 146.

5. (1960) S.C.J. 671 : (1960) 2 S.C.R. 852.

6. (1960) 1 S.C.R. 305.

7. 14 S.T.C. 188.

8. (1963) 2 S.C.J. 131 : 14 S.T.C. 416.

also not partake of the same character. In that connection, he emphasised the fact that the provisions of Article 286 (1) (a) cannot be distinguished from the provisions of Article 265. As we have already indicated, having regard to the fact that we have come to the conclusion that the other preliminary objection urged by the respondents must be upheld, we do not propose to express any opinion on this part of the controversy between the parties.

That takes us to the question as to whether the petitioners, some of whom are companies registered under the Indian Companies Act and one of whom is the State Trading Corporation, can claim to file the present Writ Petitions under Article 32 having regard to the decision of this Court in the case of the *State Trading Corporation of India, Ltd.*¹ The petitioners argue that the said decision merely held that the State Trading Corporation of India, Ltd., was not a citizen. The question as to whether the veil of the Corporation can be lifted and the rights of the shareholders of the said Corporation could be recognised under Article 19 or not was not decided, and it is on this aspect of the question that arguments have been urged before us in the present Writ Petitions.

The true legal position in regard to the character of a corporation or a company which owes its incorporation to a statutory authority, is not in doubt or dispute. The Corporation in law is equal to a natural person and has a legal entity of its own. The entity of the Corporation is entirely separate from that of its shareholders ; it bears its own name and has a seal of its own ; its assets are separate and distinct from those of its members ; it can sue and be sued exclusively for its own purpose ; its creditors cannot obtain satisfaction from the assets of its members ; the liability of the members or shareholders is limited to the capital invested by them ; similarly, the creditors of the members have no right to the assets of the Corporation. This position has been well-established ever since the decision in the case of *Salomon v. Salomon & Co.*², was pronounced in 1897 ; and indeed, it has always been the well-recognised principle of common law. However, in the course of time, the doctrine that the Corporation or a Company has a legal and separate entity of its own has been subjected to certain exceptions by the application of the fiction that the veil of the Corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the Corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more.

But the question which we have to consider is whether in the circumstances of the present petitions, we would be justified in acceding to the argument that the veil of the petitioning corporations should be lifted and it should be held that their shareholders who are Indian citizens should be permitted to invoke the protection of Article 19, and on that basis, move this Court under Article 32 to challenge the validity of the orders passed by the Sales Tax Officers in respect of transactions which, it is alleged, are not taxable. Mr. Palkhivala has very strongly urged before us that having regard to the fact that the controversy between the parties relates to the fundamental rights of citizens, we should not hesitate to look at the substance of the matter and disregard the doctrinaire approach which recognises the existence of companies as separate juristic or legal persons. If all the shareholders of the petitioning companies are Indian citizens, why should not the Court look at the substance of the matter and give the shareholders the right to challenge that the contravention of their fundamental rights should be prevented. He does not dispute that the shareholders cannot claim that the property of the companies is their own and cannot plead that the business of the companies is their business in the strict legal sense. The doctrine

1. (1963) 2 Comp. L.J. 234 : (1963) 2 S.C.J.
605.

2. L.R. (1897) A.C. 22 (H.L.).

of lifting of the veil postulates the existence of dualism between the corporation or company on the one hand and its members or shareholders on the other. So, it is no good emphasising that technical aspect of the matter in dealing with the question as to whether the veil should be lifted or not. In support of his plea, he has invited our attention to the decision of the Privy Council in the *English and Scottish Joint Co-operative Wholesale Society, Ltd. v. Commissioner of Agricultural Income-tax, Assam*¹, as well as the decision of the House of Lords in *Daimler Company, Ltd. v. Continental Tyre and Rubber Company (Great Britain), Ltd.*²

It is unnecessary to refer to the facts in these two cases and the principles enunciated by them, because it is not disputed by the respondents that some exceptions have been recognised to the rule that a corporation or a company has a juristic or legal separate entity. The doctrine of the lifting of the veil has been applied in the words of Palmer in five categories of cases : where companies are in the relationship of holding and subsidiary (or sub-subsidiary) companies ; where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors of the company on the ground that, with his knowledge, the company continued to carry on business six months after the number of its members was reduced below the legal minimum ; in certain matters pertaining to the law of taxes, death duties and stamps, particularly where the question of the "controlling interest" is in issue ; in the law relating to exchange control ; and in the law relating to trading with the enemy where the test of control is adopted.³ In some of these cases, judicial decisions have no doubt lifted the veil and considered the substance of the matter.

Gower has similarly summarised this position with the observation that in a number of important respects, the Legislature has rent the veil woven by the *Salomon Case*⁴. Particularly is this so, says Gower, in the sphere of taxation and in the steps which have been taken towards the recognition of enterprise-entity rather than corporate-entity. It is significant, however, that according to Gower, the Courts have only construed statutes as "cracking open the corporate shell" when compelled to do so by the clear words of the statute ; indeed they have gone out of their way to avoid this construction whenever possible. Thus, at present, the judicial approach in cracking open the corporate shell is somewhat cautious and circumspect. It is only where the legislative provision justifies the adoption of such a course that the veil has been lifted. In exceptional cases where Courts have felt "themselves able to ignore the corporate entity and to treat the individual shareholder as liable for its acts"⁵, the same course has been adopted. Summarising his conclusions, Gower has classified seven categories of cases where the veil of a corporate body has been lifted. But it would not be possible to evolve a rational, consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not. Badly stated, where fraud is intended to be prevented, or trading with an enemy is sought to be defeated, the veil of a corporation is lifted by judicial decisions and the shareholders are held to be the persons who actually work for the corporation.

That being the position with regard to the doctrine of the veil of a corporation and the principle that the said veil can be lifted in some cases, the question which arises for our decision is ; can we lift the veil of the petitioner and say that it is the shareholders who are really moving the Court under Article 32, and so, the existence of the legal and juristic separate entity of the petitioners as a corporation or as a company should not make the petitions filed by them under Article 32 incompetent? We do not think we can answer this question in the affirmative. No doubt, the complaint made by the petitioners is that their fundamental rights are infringed and it is a truism to say that this Court as the guardian of the fundamental rights of the citizens will always attempt to safeguard the said fundamental rights ; but having

1. (1948) 2 M.L.J. 242; L.R. 75 I.A. 196.

2. L.R. (1916) A.C. 307.

3. Palmer's Company Law, 20th Ed., p. 136. pp. 193 and 195.

4. L.R. (1897) A.C. 22 (H.L.).

5. Gower's Modern Company Law, 2nd Ed.,

regard to the decision of this Court in *The State Trading Corporation of India, Ltd.*¹, we do not see how we can legitimately entertain the petitioners' plea in the present petitions, because if their plea was upheld, it would really mean that what the corporations or the companies cannot achieve directly, can be achieved by them indirectly by relying upon the doctrine of lifting the veil. If the corporations and companies are not citizens, it means that the Constitution intended that they should not get the benefit of Article 19. It is no doubt suggested by the petitioners that though Article 19 is confined to citizens, the Constitution-makers may have thought that in dealing with the claims of corporations to invoke the provisions of Article 19, Courts would act upon the doctrine of lifting the veil and would not treat the attempts of the corporations in that behalf as falling outside Article 19. We do not think this argument is well-founded. The effect of confining Article 19 to citizens as distinguished from persons to whom other Articles like 14 apply, clearly must be that it is only citizens to whom the rights under Article 19 are guaranteed. If the Legislature intends that the benefit of Article 19 should be made available to the corporations, it would not be difficult for it to adopt a proper measure in that behalf by enlarging the definition of 'citizen' prescribed by the Citizenship Act passed by the Parliament by virtue of the powers conferred on it by Articles 10 and 11. On the other hand, the fact that the Parliament has not chosen to make any such provision indicates that it was not the intention of the Parliament to treat corporations as citizens. Therefore, it seems to us that in view of the decision of this Court in the case of *The State Trading Corporation of India Ltd.*¹, the petitioners cannot be heard to say that their shareholders should be allowed to file the present petitions on the ground that, in substance, the corporations and companies are nothing more than associations of shareholders and members thereof. In our opinion, therefore, the argument that in the present petition we would be justified in lifting the veil cannot be sustained.

Mr. Palkhivala sought to draw a distinction between the right of a citizen to carry on trade or business which is contemplated by Article 19 (1) (g) from his right to form associations or unions contemplated by Article 19 (1) (c). He argued that Article 19 (1) (c) enables the citizens to choose their instruments or agents for carrying on the business which it is their fundamental right to carry on. If citizens decide to set up a corporation or a company as their agent for the purpose of carrying on trade or business, that is a right which is guaranteed to them under Article 19 (1) (c). Basing himself on this distinction between the two rights guaranteed by Article 19 (1) (g) and (c) respectively, Mr. Palkhivala somewhat ingeniously contended that we should not hesitate to lift the veil, because by looking at the substance of the matter, we would really be giving effect to the two fundamental rights guaranteed by Article 19 (1). We are not impressed by this argument either. The fundamental right to form an association cannot in this manner be coupled with the fundamental right to carry on any trade or business. As has been held by this Court in *All India Bank Employees' Association v. National Industrial Tribunal and others*², the argument which is thus attractively presented before us overlooks the fact that Article 19 as contrasted with certain other Articles like Articles 26, 29 and 30 guarantees rights to the citizens as such, and associations cannot lay claim to the fundamental rights guaranteed by that Article solely on the basis of their being an aggregation of citizens, that is to say, the right of the citizens composing the body. The respective rights guaranteed by Article 19 (1) cannot be combined as suggested by Mr. Palkhivala, but must be asserted each in its own way and within its own limits; the sweep of the several rights is no doubt, wide, but the combination of any of those two rights would not justify a claim such as is made by Mr. Palkhivala in the present petitions. As soon as citizens form a company, the right guaranteed to them by Article 19 (1) (c) has been exercised and no restraint has been placed on that right and no infringement of that right is made. Once a company or a corporation is formed, the business

1. (1963) 2 S.C.J. 605 : (1963) 2 Comp L.J. 234. 2. (1962) 3 S.C.R. 269; A.I.R. 1952 S.C. 171.

which is carried on by the said company or corporation is the business of the company or corporation and is not the business of the citizens who get the company or corporation, formed or incorporated, and the rights of the incorporated body must be judged on that footing and cannot be judged on the assumption that they are the rights attributable to the business of individual citizens. Therefore, we are satisfied that the argument based on the distinction between the two rights guaranteed by Article 19 (1) (c) and (g) and the effect of their combination cannot take the petitioners' case very far when they seek to invoke the doctrine that the veil of the corporation should be lifted. That is why we have come to the conclusion that the petitions filed by the petitioners are incompetent under Article 32, even though in each of these petitions one or two of the shareholders of the petitioning companies or corporation have joined.

The result is, the second preliminary objection raised by the respondents is upheld and the Writ Petitions are dismissed as being incompetent under Article 32 of the Constitution. There would be no order as to costs.

K.S.

Petitions dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, J. C. SHAH, N. RAJAGOPALA AYYNGAR AND S. M. SIKRI, JJ.

K. Joseph Augusthi and others

.. *Appellants.**

v.

M. A. Narayanan

.. *Respondents.*

Banking Companies Act (X of 1949), section 45-G—Constitutional validity—If contravenes Article 20 (3) of the Constitution of India—Section 45-G (1) and (2), proviso—Construction and scope—"Acts or omissions"—If to be fraudulent or criminal—Scope of inquiry to be held before making order for public examination of director or auditor.

Constitution of India (1950), Article 20, (3)—Applicability—Essentials—"Accused of any offence".

Section 45-G of the Banking Companies Act, 1949, is not unconstitutional on the ground that it contravenes the fundamental right guaranteed by Article 20 (3) of the Constitution. The main object of Article 20 (3) is to give protection to an accused person not to be compelled to incriminate himself; that is in consonance with the basic principle of criminal law that an accused person is entitled to rely on the presumption of innocence in his favour and cannot be compelled to swear against himself. A person examined publicly under section 45-G of the Banking Companies Act may, in some cases, be a witness against himself, but unless it is shown that a person ordered to be examined publicly under section 45-G, is, before, or at the time when the order is made, an accused person, Article 20 (3) of the Constitution will not apply.

A person against whom an order for public examination is made by the High Court under section 45-G of the Banking Companies Act is not one who has been accused of any offence.

The accusation of any offence is an essential condition precedent for the application of the principle prescribed by Article 20 (3) of the Constitution and since that essential condition is lacking in cases covered by section 45-G, it cannot be held that section 45-G is invalid as contravening Article 20 (3).

Raja Narayanan Lal Bansi Lal v. Manack Phiroz Mistry, A.I.R. 1961 S.C. 29 relied on.

The scheme of section 45-G of the Banking Companies Act is first to decide whether *prima facie* there is a case for the public examination of a person; in deciding that question an opportunity has to be given to the person concerned, if it is decided to hold a public examination of that person and then to hold that examination.

The section does not require that the "acts or omissions" against the person concerned should be fraudulent. In order to attract section 45-G (1), all that is required is that his acts or omissions must have led to any loss to the Banking Company. The acts or omissions need not be necessarily criminal but may be commercially unsound or unwise. The words "acts or omissions" in section 45-G should be construed narrowly or in a restricted sense.

The proviso to section 45-G (2) which requires that the person to be publicly examined must be given an opportunity to show cause against a public examination does not mean that the matter should be fully examined by giving him an opportunity to show that the facts alleged in the report of the Official

Liquidator are untrue. What the Court has to do is only to consider the report made by the liquidator and decide whether it can reasonably entertain the opinion that any person who has taken part in the promotion or formation or conduct of the Banking Company should be publicly examined. It is a preliminary stage of the enquiry and the point which the Court has to consider is whether, *prima facie* a case has been made out to hold a public examination of the person concerned.

Appeals against the decision of the Kerala High Court directing the public examination of the Managing Director and two other Directors of the Palai Central Bank, Limited under section 45-G (2) of the Banking Companies Act (X of 1949).

V. A. Seyid Muhammad, Advocate, for Appellant (In. C.A. No. 254 of 1963)

J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates (*M/s. J. B. Dadachanji & Co.*, for Appellants (In C.A. Nos. 255 and 256 of 1963).

M. C. Setalvad, Senior Advocate, (*Atiqur Rehman, Mrs. Shureshta Kumari and K. L. Hathli*, Advocates, with him), for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—Two questions of law have been raised before us by Dr. Seyid Muhammad on behalf of K. Joseph Augusthi, the appellant in Civil Appeal No. 254 of 1963. Both of them are related to section 45-G of the Banking Companies Act, 1949 (X of 1949) (hereinafter called the Act). The first question raised has reference to the validity of the said section, and the second to its true scope and effect. Dr. Seyid Muhammad contends that the answers given by the Kerala High Court to both these questions are erroneous. According to him, section 45-G is unconstitutional inasmuch as it contravenes the fundamental right guaranteed to the citizens of this country by Article 20 (3) of the Constitution. He also argues that in making an order for the public examination of the appellant, the High Court has misconstrued the scope and effect of the relevant provisions of the said section.

The appellant Joseph Augusthi was the Managing Director of the Palai Central Bank, Limited from 26th January, 1927 to 8th August, 1960; K. George Thomas and George Joseph who are the appellants in the two other appeals Nos. 255 and 256 of 1963 respectively, were the Directors of the said Bank; the first of them was the Director from 14th January, 1935 to 8th August, 1960 and the latter from 26th January, 1927 to 8th August, 1960.

An application for the winding-up of the said Bank was made before the Kerala High Court by the Reserve Bank under section 38 (3) (b) (iii) of the Act. The said provision justifies the making of an application by the Reserve Bank in case in the opinion of the Reserve Bank, the continuance of the Banking Company in question is prejudicial to the interests of the depositors. On the 8th August, 1960, an order was passed on the said application appointing the Official Liquidator of the High Court the Provisional Liquidator of the Bank. The order of winding-up then followed on the 5th December, 1960, and on the 8th December, 1960, an Official Liquidator was appointed under section 39 of the Act. After the Official Liquidator came on the scene, he made three reports to the High Court—Report No. 192 on the 17th August, 1961; Report No. 242 on 29th September, 1961 and Report No. 350 on the 4th December, 1961. All these reports were made under section 45-G (1) of the Act. The appellants filed their objections on the 23rd November, 1961, to the first two reports. The matter was then considered by the learned single Judge of the Kerala High Court and after hearing the parties, he made an order directing the public examination of the three appellants under section 45-G (2).

This order was challenged by the appellants by preferring three appeals before a Division Bench of the High Court. The Division Bench agreed with the view taken by the learned single Judge and dismissed the three appeals. The appellants then applied for and obtained certificates from the High Court and it is with the said certificates that they have come to this Court by the present three appeals.

The first point which has been argued before us by Dr. Seyid Muhammad is that section 45-G is unconstitutional because it contravenes the fundamental right

guaranteed by Article 20 (3) . In order to appreciate this argument, it is necessary to read section 45-G (1) and (2) :

“(1) Where an order has been made for the winding-up of a banking company, the Official Liquidator shall submit a report whether in his opinion any loss has been caused to the banking company since its formation by any act or omission (whether or not a fraud has been committed by such act or omission) of any person in the promotion or formation of the banking company or of any director or auditor of the banking company.

(2) If, on consideration of the report submitted under sub-section (1), the High Court is of opinion that any person who has taken part in the promotion or formation of the banking company or has been a director or an auditor of the banking company should be publicly examined, it shall hold a public sitting on a date to be appointed for that purpose and direct that such person, director or auditor shall attend thereat and shall be publicly examined as to the promotion or formation or the conduct of the business of the banking company, or as to his conduct and dealings, in so far as they relate to the affairs of the banking company :

Provided that no such person shall be publicly examined unless he has been given an opportunity to show cause why he should not be so examined.”

The other sub-section of this section need not be cited, because it would be enough for our purpose to notice, in substance, what their effect is. Sub-section (3) allows the Official Liquidator to take part in the examination and to employ such legal assistance as may be sanctioned by the High Court, if he is specially authorised by the High Court in that behalf. Sub-section (4) permits the creditor or contributory to take part in the examination either personally or by any person entitled to appear in the High Court. Sub-section (5) gives authority to the High Court to put questions to the person who is being examined, sub-section (6) empowers oath to be administered to the said person and compels him to answer questions as may be put to him by the High Court, or as the High Court may allow to be put to him. Under sub-section (7), such a person is entitled to appear by a lawyer and the lawyer so appointed shall be at liberty to put to him such questions as the High Court may deem fit just for the purpose of enabling him to explain or qualify any answer given by him ; there is a proviso to this sub-section which authorises the High Court to make an order of costs in its discretion in case the person under examination is exculpated from any charges made or suggested against him. Sub-section (8) deals with the procedure to be followed in keeping a record of the examination. Sub-section (9) provides that where after the examination of the person, the High Court is satisfied that a person, who has been a director of the banking company, is not fit to be a director of a company or an auditor, or a partner who has been acting as such auditor, is not fit to be such an auditor or partner, the High Court may make an order that that person shall not, without the leave of the High Court, be a director of, or in any way, whether directly or indirectly, be concerned or take part in the management of, any company, or, as the case may be, act as an auditor of, or be a partner of a firm acting as auditors of, any company for such period not exceeding five years as may be specified in the order.

Thus, it will be clear that the scheme of section 45-G is first to decide whether, *prima facie*, there is a case for the public examination of a person ; then in deciding this question, give an opportunity to the person concerned, if it is decided to hold a public examination of the said person, proceed to hold that examination ; if suggestions made against the person examined are found to be unwarranted, make an order of costs in his favour ; and if the person concerned is found to have been responsible for acts or omissions which caused loss to the banking company, to make a penal order disqualifying such person from acting as a director or an auditor as indicated by sub-section (9). It is in the light of this scheme that the argument about the contravention of Article 20 (3) falls to be examined.

Article 20 (3) provides that no person accused of any offence shall be compelled to be a witness against himself. It may be conceded that when a person is compelled to submit to a public examination, that itself, *prima facie*, looks like pillorying him in the public gaze. It is also true that section 45-G (6) compels the person to answer questions which the High Court may put to him ; or which the High Court may allow to be put to him, and it is quite likely that in cases where public examina-

tion is ordered to be held, some suggestions and even some charges may be levelled against the person examined by reference to his acts or omissions in relation to the promotion, formation or conduct of the banking company of which he was a director or an auditor. Therefore there is no difficulty in holding that a person examined publicly under section 45-G, may, in some cases, be compelled to be a witness against himself. Thus, one element of Article 20 (3) is satisfied, but the question still remains whether the other essential element is satisfied or not.

Article 20 (3) guarantees to every citizen the fundamental right not to be compelled to be a witness against himself, provided the person who is being compelled in that way, is accused of any offence. In other words, it is only when a person can be said to have been accused of any offence that the prohibition prescribed by Article 20 (3) comes into operation. If a person who is not accused of any offence, is compelled to give evidence, and evidence taken from him under compulsion ultimately leads to an accusation against him, that would not be a case which would attract the provisions of Article 20 (3). The main object of Article 20 (3) is to give protection to an accused person not to be compelled to incriminate himself and that is in consonance with the basic principle of criminal law accepted in our country that an accused person is entitled to rely on the presumption of innocence in his favour and cannot be compelled to swear against himself. Therefore, unless it is shown that a person ordered to be publicly examined under section 45-G is, before, or at the time when the order for examining him publicly is passed, an accused person, Article 20 (3) will not apply.

What then is the position with regard to a person against whom an order for public examination is made by the High Court? All that has happened at the relevant time is that the official liquidator has submitted reports indicating that in his opinion, loss has been caused to the banking company under liquidation by the acts or omissions of the appellants, and the High Court on considering the reports and taking into account the explanation given by the appellant, has come to the conclusion that, *prima facie*, a case has been made out for their public examination. In such a case, how can it be said that the appellants have been accused of any offence? The whole object of the enquiry is to collect evidence and decide whether any acts or omissions caused loss to the banking company. It may be that as a result of the enquiry, the Court may reach the conclusion that the alleged acts or omissions did not cause any loss; in such a case, nothing further has to be done. On the other hand, it is likely that the opinion formed by the liquidator may be vindicated and the Court may come to the conclusion that some or all of the acts or omissions on which the liquidator's opinion was based did cause loss to the banking company, and in that case some action may conceivably be taken against the persons examined in addition to the action contemplated by section 45-G (9). That, however, only means that after the examination is over and the material adduced before the Court has been examined by the Court an occasion may or may not arise to take any action. In such a case, what may conceivably follow cannot be said to be existing before the order is passed under section 45-G, an accusation may follow the enquiry, but an accusation was not in existence at the time when the public examination was ordered, and so, the appellants cannot contend that they were accused of any offence at the time when the order for their public examination was passed by the High Court. The accusation of any offence which is an essential condition for the application of Article 20 (3) is a condition precedent for the application of the principle prescribed by the said Article, and since this essential condition is lacking in all cases covered by section 45-G, it is difficult to sustain the argument that the said section contravenes Article 20 (3). Therefore, we do not think Dr. Seyid Muhammad is right in contending that section 45-G is invalid on the ground that it contravenes Article 20 (3) of the Constitution. It appears that in the case of *Mallala Suryanarayana v. The Vijay Commercial Bank, Ltd.*¹ the same view has been expressed by this Court, though it may be added that this question does not appear to have been then elaborately argued.

1. C.A. No. 286 of 1959, decided on 26th October, 1961.

In this connection, we may refer to a decision of this Court in *Raja Narayan Lal Bansi Lal v. Manack Phiroz Mistry and another*¹, where a somewhat similar provision contained in section 240 of the old Companies Act fell to be considered and it was held that it did not contravene Article 20 (3) of the Constitution.

That takes us to the question of the construction of section 45-G. Dr. Seyid Muhammad contends that section 45-G, requires that the acts or omissions alleged against a person should be acts which are prohibited by law or omissions in relation to acts the performance of which is enjoined by law, and he suggests that if this interpretation is put on the words "acts or omissions," it would appear that the reports made by the liquidator in the present case have not made out any case for the public examination of the appellants. We are not impressed by this argument. It is significant that the acts or omissions to which section 45-G (1) refers need not be fraudulent acts or omissions, because, in terms, the section provides that the act or omission would attract section 45-G (1) if it has led to any loss to the banking company even though fraud may not have been committed by such act or omission. The context also shows that what the Court has to consider, is whether any act or omission on the part of the director or the auditor of the banking company has caused any loss to the company. Now, such an act or omission need not necessarily be criminal; it may even include acts or omissions which are commercially unsound or unwise. In this connection, it may be recalled that section 478 of the Companies Act which deals with a similar problem, requires that the report of the Official Liquidator should disclose his opinion that a fraud has been committed. To the same effect is the provision contained in section 268 of the English Companies Act (11 and 12 Geo. 6, c. 38). Therefore, it would, we think, be unreasonable to put a narrow and restricted construction on the words "acts or omissions" used by section 45-G (1).

Dr. Seyid Muhammad has then contended that in dealing with the reports made by the liquidator in the present case, the High Court has not given effect to the provision contained in the Proviso to section 45-G (2). The said proviso requires that no person shall be publicly examined unless he has been given an opportunity to show cause why he should not be so examined, and Dr. Seyid Muhammad argues that unless the matter is fully examined and an opportunity is given to him to show that the facts alleged in the reports are untrue, the requirements of the proviso will not have been satisfied and his grievance is that no such opportunity was given to the appellants in the present case. There is no substance even in this argument. What the Court has to do in exercising its power under section 45-G (2) is to consider the report made by the liquidator and decide whether it can reasonably entertain the opinion that any person who has taken part in the promotion or formation or conduct of the banking company should be publicly examined. In other words, it is a preliminary stage of the enquiry and the point which the Court has to consider is whether, *prima facie* a case has been made out to hold a public examination of the person concerned. It cannot be the object of section 45-G (2) read with the Proviso that the Court should allow the appellants to lead evidence rebutting the allegations made by the liquidator in his reports, for if such a course was adopted, it would itself develop into a full-fledged enquiry and the very object of a limited enquiry at the initial stage would be defeated. What the Court can and should do in such cases is to read the report submitted by the Official Liquidator, consider whether the opinion expressed in the report appears to be, *prima facie*, reasonable; hear the explanation of the person concerned; and find out *prima facie* whether the explanation tendered by the person is sufficient to reject the liquidator's request for such person's public examination and whether, on the whole, it is just and beneficial to the interest of the banking company that public examination should be held. The subject-matter of this preliminary investigation is not the whole of the enquiry on the merits; it is an enquiry as to whether the director or the auditor should be publicly examined. Therefore, we do not think Dr. Seyid Muhammad is justified in contending that the High Court

2. (1961) 1 M.L.J. (S.C.) 73 : (1961) 1 An. W.R. (S.C.) 73 : (1961) Mad.L.J. (Cr.)

208 : (1961) 1 S.C.J. 353 : A.I.R. 1961 S.C. 29.

has ignored the safeguard afforded to the appellants by the Proviso to section 45-G(2).

The question about the construction of section 45 -G (1) and (2) does not present any serious difficulty. What must be disclosed by the report of the Official Liquidator is the act or omission of the person there specified which has led to loss to the banking company since its formation. The acts or omissions to which section 45-G (1) refers, when considered in the light of section 45-G (2), are acts or omissions "as to the promotion, or formation, or the conduct of the business of the banking company, or as to his conduct and dealings in so far as they relate to the affairs of the banking company", so that after the report is made, the Court takes a broad and overall view of the state of affairs disclosed by the report and considers *prima facie* whether a case has been made out for the public examination of the director or the auditor. We are satisfied that the High Court has dealt with the matter precisely in this way, and no grievance can be made against its decision on the ground that the provisions of the Proviso to section 45-G (2) have been ignored.

In support of his argument that the High Court has misconstrued the effect of the provisions of section 45-G (1), Dr. Seyid Muhammad referred to two decisions which may be mentioned at this stage. The first of these is the decision of the House of Lords in *Ex parte George Stapylton Barnes*¹. In that case, the question which fell to be considered was the scope and effect of section 8 (3) of the Companies (Winding-up) Act, 1890; Lord Halsbury observed that he entertained not the smallest doubt that the meaning of this legislation is that, in order to give the Court jurisdiction to make an order for public examination, there must be a finding of fraud and a finding of fraud against an individual who is thereby made subject to being summoned before the Court, and is compelled to answer, whether the answer incriminates him or not, but, being exculpated, receives his costs. He further observed :

"I confess I am unable, looking at the whole of the legislation on the subject, to entertain the least doubt that that was what the Legislature intended, and I am a little surprised, I confess, that there should have been any doubt that fraud must be found."

In our opinion, this passage is hardly relevant for our purpose, because as we have already indicated, section 45-G (1) expressly provides that the act or omission complained of need not necessarily be fraudulent, and so, there can be no question, under section 45-G (1) of coming to a conclusion that fraud has been committed before directing public examination of a person.

The other decision on which Dr. Seyid Muhammad has relied is the judgment of the Bombay High Court in *Sir Fazal Ibrahim Ralimtoola v. Appabhai G. Desai*². In that case, dealing with the provisions contained in section 196 of the old Companies Act, Chagla, C.J., disapproved of the practice of ordering *ex parte* public examination of persons. In that connection, he quoted with approval the warning sounded by Sri Lawrence Jenkins in *The Ahmedabad Advance Spinning and Weaving Company v. Lakshmi Shanker*³, that the practice of passing *ex parte* orders involving the person affected in serious liability is much to be deprecated. In that case, the Bombay High Court was called upon to consider whether the allegations made against the director were vague and indefinite. As we will presently point out, that difficulty does not arise in the present appeals. The allegations made by the liquidator in his reports against the appellants are clear, precise and definite.

Let us now refer to the reports submitted by the liquidator in the present case. In the first report, the liquidator has stated that in carrying out the affairs of the bank, the directors, with the help of officers appointed by them out of their own relatives, have not properly conducted the affairs of the bank. He has also stated that in his opinion, loss had been caused to the bank since its formation by the acts and omissions of the Directors and of the auditor of the bank. The report then proceeds

1. L.R. (1896) A.C. 146 at 152.
2. A.I.R. 1949 Bom. 339.

3. (1904) I.L.R. 30 Bom. 173.

to specify the extent of the loss and the causes for the said loss. It appears from the report that loans were advanced by the bank without regard to the question of any adequate security. In many cases, loans were advanced without any security at all and the inevitable consequence has been that a large number of debts have become barred by time long before the winding-up proceedings were started. The bank appears to have paid dividends without earning profits. Similarly, though it did not earn any profits between 1936 to 1958, it submitted reports showing substantial amounts as net income and so, it has paid income-tax on the said amounts. A large amount of advances appears to be irrecoverable. At the end of his report, the liquidator has mentioned 10 persons, including the three appellants before us, whose acts and omissions, in his opinion, contributed to loss to the banking company. Two further reports were made by the liquidator and they support the opinion expressed by him in his first report. The third of these reports was filed after this matter was heard by the learned Single Judge but the first two reports themselves fully justify the order made by him, and so, the third report can well be left out of consideration.

When we turn to the objections filed by the appellants, it is clear that some of the facts are not seriously disputed. Take, for instance, the allegation that dividends were declared without earning profits. The appellant Joseph Augusthi contended before the High Court that the bank used to treat interests accrued on advances, though not received, as income, and so, income-tax and super-tax were paid on such income and dividends were also paid on the same basis. He suggested that the Reserve Bank had noticed these facts and had waived its objection. In other words, he relied on a practice which is obviously unsound in a commercial sense and pleaded that at this stage the Reserve Bank cannot challenge the correctness or propriety of the said practice. This practice has been described by the appellant as mercantile system of accounting. It would thus be seen that some of the facts alleged by the liquidator in his report are not disputed; the effect of those facts was a matter of argument between the parties before the High Court. In such a case, we do not see how the appellants can successfully challenge the correctness of the view taken by the High Court that a case had been made out for the public examination of the appellants. That is why we do not think there is any substance in the argument urged before us by Dr. Seyid Muhammad that on the facts, an opportunity had not been given to the appellants to show that their public examination should not be ordered. We are satisfied that in dealing with the facts of this case, the Courts below have taken into account the reports made by the liquidator and after considering the objections raised by the appellants, they have come to the right conclusion that the appellants should face a public examination.

The result is the appeals fail and are dismissed with costs. One set of hearing fees.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

, PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Income-tax Officer, Kolar Circle, Kolar and another .. Appellants*

v.

Seghu Buchiah Setty .. Respondent.

Income-tax Act, (XI of 1922), section 29 [cf. Income-tax Act (XLIII of 1961), section 156]—Notice of demand pursuant to assessment order made by Income-tax Officer—Initiation of recovery proceedings, on default of payment—Appellate order reducing tax liability—Continuance of recovery proceedings—Fresh notice of demand essential.

On the failure of the assessee to pay the tax in pursuance of a notice of demand issued by the Income-tax Officer, recovery proceedings were initiated and the properties of the assessee were attached. Meanwhile, in the appeal filed by the assessee against the order of assessment, the Appellate Authority reduced the assessable income and directed the Officer to recompute the tax. The Income-tax Officer wrote a letter to the assessee informing him about the reduction and calling upon him to pay the tax as reduced. The assessee applied under Article 226 of the Constitution, to the High Court, for quashing the recovery proceedings on the ground that the appellate order had superseded all the proceedings, and without a fresh notice of demand the recovery proceedings could no longer be continued. The High Court issued a writ and quashed the recovery proceedings. On appeal by the Department, by Special Leave,

H'd.—On the order of the Income-tax Officer being revised in appeal, the default based on it and all consequential recovery proceedings must be taken to have been superseded and fresh proceedings have to be started to realize the tax dues as found by the revised order, by issuing a fresh notice of demand.

If the original order has been destroyed or replaced by the appellate order, the notice of demand and all other steps based upon the original order must be deemed to have become ineffective. In such a case the default earlier incurred must be taken to have disappeared and cannot support further action for recovery of any tax.

When an order of enhancement of assessment is made under section 31 of the Act, the earlier notice of demand issued in respect of the original order must be deemed to have been superseded and a fresh notice of demand in respect of the entire amount and not for the enhanced amount only should be issued. In all cases of appellate order reducing the amount, fresh notice of demand should be issued.

Section 29 of the Act in its terms is extremely clear and indicates that a notice of demand must always issue, when any tax is due in consequence of any order passed under or in pursuance of the Act. "Any order" means not only an order passed by the Officer himself, but also an order passed by reason of the success of an appeal which the assessee may file and in which the old assessment is set aside.

The notice of demand is a vital document, disobedience to which makes the assessee a defaulter, and is a condition precedent to the treatment of the tax as an arrear of land revenue, and the strating point of limitation for an appeal and for recovery proceedings.

In view of the consequences that ensue, that when an assessment is gone through a second time and the amount of tax is reduced, the Officer must intimate to the assessee the reduced amount of tax and make a demand and give him an opportunity to pay before treating him as a defaulter. This is incumbent because the assessment resulting in the tax is itself set aside or modified and an assessee is entitled to a proper assessment and ascertainment of tax before a demand can be made on him.

Per Shah, J.—The Legislature has not enacted that the steps taken by the Income-tax Officer for recovery of tax will lapse or be superseded when the appeal against the order of assessment passed by the officer is disposed of by the appellate authority. No fresh notice is contemplated to be given by the Act in the case either of reduction or enhancement.

The status of a defaulter under the Act is a condition precedent for initiation of proceedings for recovery, and by the reduction of liability in appeal the status is not altered. Even if the amount due is modified, the status persists, but the process for recovery will be adjusted according to the modified demand.

Appeal by Special Leave from the Judgment and Order dated 16th April, 1959, of the Mysore High Court in Writ Petitions Nos. 138 and 139 of 1956.

N. D. Kharkhanis and *R.N. Sachthey*, Advocates, for Appellants (in both the Appeals.)

K. Srinivasan and R. Gopalakrishnan, Advocates, for Respondent (in both the Appeals).

The Court delivered the following Judgments—

Sarkar, J.—The question in these two appeals is whether certain proceedings for the recovery of tax from the assessee under the Income-tax Act, 1922, were invalid and should be quashed as the assessment order on which they were based had been revised in appeal. The High Court of Mysore held them to be invalid and quashed them. The Revenue Authorities have now appealed to this Court against that decision.

I think it will be helpful to set out the facts chronologically. The tax sought to be realised became due under two assessment orders passed by an Income-tax Officer on 23rd March, 1955, in respect of the years 1953-54 and 1954-55 finding that the assessee's income for the earlier year was Rs. 61,000 on which a tax of Rs. 19,808-1-0 was due and that for the other year was Rs. 1,21,000 creating a tax liability of Rs. 66,601-3-0. Notices of demand under section 29 of the Act were issued in respect of these dues. The assessee filed appeals to the Appellate Assistant Commissioner against the assessment orders but did not pay the tax as demanded by the notices. On such failure to pay, the Income-tax Officer sometime in September, 1955 sent certificates to the Deputy Commissioner, Kolar, under section 46 (2) of the Act for recovery of the tax as arrears of land revenue and the latter in the course of the same month attached various properties of the assessee under the Revenue Recovery Act. Thereafter on 17th December 1955, the appeals filed by the assessee which were till then pending were decided by the Appellate Commissioner. He reduced the assessable income of the assessee to Rs. 27,000 for the year 1953-54 and to Rs. 45,000 for the year 1954-55 and directed the Income-tax Officer to recompute the tax on the basis of the reduced income and to refund the excess if any collected. It appears that thereafter on 19th February, 1956, the Income-tax Officer informed the assessee that his tax liability for 1953-54 had been reduced to Rs. 4,215-9-0 and for 1954-55 to Rs. 13,346-8-0 and called upon him to pay these amounts at once into the local treasury. The assessee filed further appeals against the orders of the Appellate Commissioner and asked that the recovery proceedings might be stayed pending decision of these appeals and on that request being rejected, moved the High Court of Mysore by two petitions under Article 226 of the Constitution for quashing the recovery proceedings as invalid with the result earlier mentioned. We are not concerned with the appeals filed by the assessee from the appellate orders and no further reference to them will be made in this judgment.

The contention of the assessee is that in view of the orders of the Appellate Commissioner the earlier orders, notices of demand and certificates must be deemed to have been superseded and the attachments therefore ceased to be effective from the date of the appellate orders and could no longer be proceeded with. He contends that the Income-tax Officer had to start afresh by serving a new notice of demand and taking the necessary further steps thereon for realisation of the tax which then was due only under the appellate orders. These contentions were accepted by the High Court. The Revenue Authorities on the other hand, contend in short that the Act does not provide for any such supersession.

Now, the scheme of the Income-tax Act for realisation of moneys becoming due under it appears to be this. The tax becomes due on the making of an assessment order or an order imposing penalty or requiring interest to be paid. Thereafter a notice of demand in respect of that amount has to be served. This is provided by section 29 which is set out below.

"Section 29—When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable.

The form mentioned contains directions as to the time within which, the person to whom and the place at which the payment is to be made.

The consequences that follow a non-compliance with a notice of demand served under section 29 are set out in section 45 which so far as material is in the following terms :

Section 45.—Any amount specified as payable in a notice of demand under sub-section (3) of section 23-A or under section 29 or an order under section 31 or section 33, shall be paid within the time, at the place and to the person mentioned in the notice or order or if a time is not so mentioned, then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal under section 30, the Income-tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of.

It will be noticed that this section is not confined to the effect of a failure to comply with the terms of a notice of demand issued under section 29 but makes the same consequence arise on the failure to carry out the terms of a notice under section 23-A (3) and orders under sections 31 and 33. That consequence is that the assessee is to be deemed to be in default. It is after an assessee is so in default that coercive processes for realisation of the amount due start. Provision for this is made in section 46 to which I will immediately come. Before doing so, however, I wish to observe that section 45 gives an Income-tax Officer on an appeal being filed a discretion to treat an assessee as not in default. An argument has been founded on this aspect of the section and to it I will later refer.

Passing on now to section 46, it will be enough for the purposes of these appeals to refer only to sub-section (2) of that section. This provides that

“The Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue.”

It was under this provision that in the present case the Income-tax Officer sent the certificates to the Deputy Commissioner and the latter effected the attachment thereafter under the Revenue Recovery Act.

Now there is no dispute that all steps taken in the present case by the Revenue Authorities were valid when taken for the appellate orders had not till then been made. The only question is as to the effect of the appellate orders. It is contended on behalf of the Revenue Authorities that the Act does not provide that the consequences of a default incurred under the Act cease to be available to the Revenue Authorities for realisation of the amount due in case the order which was the basis of the default was later revised in appeal. It is, therefore, said that those consequences are not affected by the revision of the order except where it is annulled and hence all notices and attachments remain in force and can be acted upon for recovering the tax due.

I am unable to agree with this proposition. It may be that the Act contains no express provision stating what would happen to the default already incurred when the order under which it was incurred was later revised in appeal. But I think there is enough in the Act to indicate that in some of these cases at least the default comes to an end. If it does, it seems to me to follow inevitably that the consequences of the default also disappear.

I would first refer to section 45 which says that when an order under section 31 specifies an amount as payable and the amount is not paid within the time, at the place and to the person mentioned in the order or where no time is mentioned in it, within the time specified in the section itself, the assessee so failing to pay shall be deemed to be in default. The order under section 31 is an order by the Appellate Commissioner. If he specifies an amount as payable in his order and mentions the time when, the place where and the person to whom the payment is to be made then non-compliance with that order would create a default. Now this order is made in an appeal from an order made by the Income-tax Officer. Suppose there is already a default as a result of non-compliance with a notice under section 29 given in respect of the Income-tax Officer's order. As clearly there could not be two defaults for there was one liability, the Act must in such a case be taken to have provided by

necessary implication that the default incurred as a result of non-compliance with the notice to pay the amount mentioned in the Income-tax Officer's order must be deemed to have been superseded by the appellate order. The contention that the Act does not contemplate a default ceasing to be so except when an assessment order is annulled by the appellate order, is, therefore, unfounded. Take another case. Suppose the appellate order says only that a different amount from that mentioned in the Income-tax Officer's order shall be payable on income for a certain period without specifying the person to whom or the place where it is to be paid. The effect of it must be to wipe out the Income-tax Officer's order since the two cannot exist together. In such a case along with the superseded order the default if any incurred in connection with it must also disappear. There will have to be a fresh notice under section 29 in respect of the amount due under the appellate order on breach of which a fresh default may arise.

It was, however, said that the Act nowhere requires the appellate order to state the amount payable or to specify the time when, the place where and the person to whom it is to be paid. That may be so but that does not affect what I have said. Section 45 clearly contemplates the appellate order setting out these things and there is nothing in the Act to prevent the Appellate Commissioner from setting them out. Since section 45 cannot be read as contemplating an impossibility, it must be held that the Appellate Commissioner may in his order specify the amount payable and state the other particulars about time of payment, etc. If he can do so, that would be enough for my present purpose and it is not necessary for it that the Act must in every case require him to do so. In case where the appellate order specifies an amount as payable, the Income-tax Officer's order must be deemed to have been superseded.

One other argument to which I have to refer at this stage is that if the assessee's contention be correct, then the discretion given to the Income-tax Officer by section 45 not to treat an assessee in default becomes infructuous, for, then in every case on the making of the appellate order the default earlier incurred must disappear. This does not seem to me to put the position accurately. It is not in dispute that the filing of an appeal does not stay the operation of the original order. So if before the appellate order is made, the amount due is realised by the coercive process following the default, then those steps do not become invalid. There may be a liability to refund but nonetheless what was done was legal when done. Again it would, in my view, depend on the terms of the appellate order whether the earlier default was wiped out or not. If for example, the appellate order confirms the original order then the default already incurred may not be affected. In both these cases the discretion to treat the assessee as a defaulter was effectively exercised. The argument that the acceptance of the assessee's contention would render part of section 45 nugatory and should, therefore, not be accepted, is in my opinion unsound.

How then does the matter stand? It seems to me that the crux of it is the effect of the appellate order on the original order. If the original order has been destroyed or replaced by the appellate order, then the notice of demand and all other steps based upon the original order must be deemed to have become ineffective. In such a case the default earlier incurred must be taken to have disappeared and cannot support further action for recovery of any tax. Now the general proposition is that an original order merges in the appellate order: cf. *Madan Gopal Rungta v. Secretary to the Government of Orissa*¹. But in the present case, it is not necessary to rely on that proposition. Section 31 (3) of the Act seems to me to make express provision on the subject. It states that in the case of an appeal from an order of assessment, which is the kind of order with which we are now concerned, the Appellate Commissioner may

"(a) confirm, reduce, or enhance or annul the assessment, or (b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further enquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct, and the Income-tax Officer shall thereupon proceed to make such fresh assessment and determine where necessary the amount of tax payable on the basis of such fresh assessment."

There will of course, be no occasion to determine the amount of the tax payable on the basis of the fresh assessment if the income on that assessment appears to be below the taxable level. I will consider the various orders contemplated by section 31 (3) (a) and (d) and their effect.

It may be that when an appellate order confirms the original order, the default earlier incurred and all steps taken pursuant thereto remain unaffected, for such an order may maintain intact the original order. Now it is not in dispute that when the appellate order annuls the earlier order, the default disappears. It is said that that is because the debt ceases to exist. I do not quite follow this. It has never been questioned that the debt becomes due when demand is made under section 29 and section 45 of the Act : see *Doorga Prasad Chamaria v. Secretary of State*.¹ Therefore if a debt is to cease to exist it must be because the source from which it sprang, namely, the original order, has been annihilated by the appellate order annulling it. In fact, section 31 (3) (a) contemplates an annulment of the original assessment order itself ; the demand under section 29 or section 45 is not annulled directly by it. Therefore, in the case of an order of annulment under section 31 the original order of assessment is itself destroyed. If it disappears, I cannot conceive the default based on it continuing in force. Likewise, where under clause (b) of section 31 (3) the appellate order sets aside the assessment, the same result must clearly follow. There is not much difference between annulling an order and setting it aside ; both wipe out the original order.

I now come to an appellate order enhancing the assessment. With regard to it, it has not been disputed that a fresh notice of demand must issue. If this notice has to be in respect of the entire amount, then clearly the default earlier incurred for the smaller amount found due by the original order must have gone for the liability was one and there could not be two defaults in respect of it. But it was said that the notice has to be issued in respect of the enhanced amount only. Indeed in some of the cases cited at the Bar it has been so said. I have very grave doubts about the correctness of this view. The notice of demand can only issue in respect of the amount due in consequence of an order. Unless, therefore, the appellate order specifies only the enhanced amount as due I do not see how a notice in respect of that amount can be issued under section 29. The appellate order has to specify an amount due. If it specifies the entire amount due including the enhancement, then it cannot be said that under it the amount of the enhancement only is due and notice demanding such an amount only under section 29 can be issued. If the appellate order specifies only the amount of the enhancement, it will be making an additional or supplementary assessment. Apart from section 34 of the Act with which we are not now concerned, I am not aware of any other provision which permits such an assessment. In any case section 31 (3) (a) does not seem to me to contemplate it. Therefore, in my view when an order of enhancement of assessment is made under section 31 the notice must be in respect of the entire amount and in such a case the earlier notice issued in respect of original order must be deemed to have been superseded.

But assume I am wrong in this. Assume that an appellate order of enhancement may be confined to the amount of the enhancement only. Even so I am wholly unable to agree that the appellate order cannot specify the entire enhanced amount due. There is nothing in the Act to prevent this being done. When this is done then at least the original order and the notice must be deemed to have been put out of existence along with the default arising from the non-compliance with the latter and all its consequences.

That leaves only the case of an appellate order reducing the amount. It seems to me that it would be somewhat curious if in all other cases excepting the case of a confirmation, the appellate order destroys the original order it does not do so in the

1. I.L.R. (1945) 2 Cal. 1 : L.R. 72 I.A. 114.

case of a reduction. An order confirming may be different for it confirms and, therefore, does not destroy. It has, however, been said that

"if subsequently the demand is modified on appeal and the amount on the tax payable is reduced, all that happens is that the liability sought to be imposed by the notice of demand, in respect of the amount by which the assessment is reduced is found to have never been a liability at all but the liability in respect of the remainder which stands unaffected by the appellate order remains"

and also that

"where a notice of the demand has in fact, been issued in respect of a larger amount as determined by the assessment order, it has been issued even in respect of the smaller amount which is ultimately found to be the tax properly payable. That being so, the assessee was under an obligation to pay it by the date fixed and if he did not pay it by that date, he becomes a defaulter": See *Ladunram Taparia v. D. K. Ghosh and others*¹.

With great respect I am unable to accede to this proposition and the conclusion based thereon that the default and its consequences continue even after the appellate order reducing the original assessment. How does the assessee know before the appellate order the smaller amount which he might ultimately be liable to pay? It would be curious if he did not know what he had to pay and could still have defaulted in paying it.

The order of reduction must, in my opinion, necessarily have the effect of setting aside the original order as a whole. It does not simply strike out a few of the figures appearing in the original order. That would really be a case of rectification for which provision is made in section 35 of the Act. What an appellate order does in a case of reduction is, as in the present case, to go into all the figures and arrive afresh at the assessable income which replaces the amount of the income arrived at by the Income-tax Officer. Therefore it seems to me that in all cases of an appellate order reducing the assessment the original order goes and if it goes, of course the notice of demand also falls to the ground and the default based thereupon also ceases to be default anymore. Suppose the appellate order itself stated that a smaller amount of tax was payable after it had reduced the figure of the assessable income at which the Income-tax Officer had arrived. Indeed I cannot imagine how else it can be expressed. After such an order the original order must go for the debt being one the two cannot exist together. If that order goes, all default arising out of it must also go.

Therefore I think that on the Income-tax Officer's order being revised in appeal the default based on it and all consequential proceedings must be taken to have been superseded and fresh proceedings have to be started to realise the dues as found by the revised order.

Coming now to the present case, in view of the order made in it it seems to me impossible to contend that the original default continued. What happened in the present case was that on December 17, 1955 the Appellate Commissioner reduced the assessable income of the assessee as found by the Income-tax Officer by a large sum and directed him to recompute the tax due on the basis of the assessable income stated in the appellate order. The assessee was not informed about the recomputed amount of tax till February 14, 1956. The assessee had not paid the tax mentioned in the Income-tax Officer's order. If he had done that then he would under the express terms of the appellate order have become entitled to a refund. What then was the position between these two dates? If the Revenue Authorities are right, then the assessee continued to be in default even after the appellate order. But what was the amount in respect of which he was so in default? Clearly he could not have continued to be in default in respect of the amount found due by the Income-tax Officer in his original order for that amount was no longer due. He could not have been in default in respect of the amount which was found due on recomputation by the Income-tax Officer according to the direction of the Appellate Commissioner because he did not know that amount. It would be absurd if the Act contemplated a default without the assessee knowing the amount in respect of which the default occurred and without his having a chance to pay it.

It would be impossible to construe the Act in a way to produce that result. It has, therefore, to be held that between the date of the appellate order and the communication of the recomputed amount of the tax to the assessee by the Income-tax Officer there could be no default. Since the Act does not provide for a default being in suspension for a period it must be held that the original default ceased to exist after the appellate order was made. Proceedings initiated on the original default before the appellate order could not, therefore, be continued any more. Indeed the appellate order superseded the original order and its consequences.

If the effect of an appellate order reducing the assessment as in the present case did not wipe out the original order, a most anomalous situation would, in my view, arise. Under section 46 (1) of the Act after a default has been committed in terms of section 45 (1) the Income-tax Officer may impose a penalty not exceeding the amount of the tax due in respect of which the default has occurred. This penalty may be recovered in the same way as the tax due, that is to say, by a notice under section 29 and thereafter by a certificate issued under section 46 (2). Now suppose the penalty for the full amount of the tax found due by the Income-tax Officer has been imposed and thereafter the appellate order reduces the amount of the tax. What happens to the order of penalty then? Obviously it does not automatically stand reduced to the reduced amount of the tax. It would again be absurd if the penalty could be recovered for the full original amount. The only sensible view to take in such a case would be that the order of penalty falls to the ground and the only logical way to support that conclusion would be to say that the original default has disappeared.

For these reasons I have come to the conclusion that the decision of the High Court was right and I would, therefore, dismiss the appeals.

Hidayatullah, J.—These appeals by Special Leave arise from a common order in two Writ Petitions under Article 226 of the Constitution passed by the High Court of Mysore on April 16, 1959. The Income-tax Officer, Kolar and the Commissioner of Income-tax, Bangalore, are the appellants before us. The assessee Seghu Buchiah Setty, who is the respondent, is a merchant of Srinivasapur, Kolar District. The appeals relate to the assessment years 1953-54 and 1954-55 in respect of which assessments were made under section 23 (4) of the Income-tax Act. For the assessment year 1953-54, the assessee's income was estimated to be Rs. 61,000 and the tax levied was Rs. 19,808-1-0. For the second year, his income was estimated to be Rs. 1,21,000 and the tax levied was Rs. 66,601-3-0. The assessee applied under section 27 of the Income-tax Act for the cancellation of these assessments, but his applications were rejected. It was stated before us that other proceedings were pending in this behalf; but I am not concerned with them except in so far as a preliminary objection based on those and some other proceedings was made before us to which I shall refer presently. After the assessment was made, the Income-tax Officer sent notices of demand asking the assessee to pay Rs. 86,409-4-0 as tax, and on default, issued a certificate under section 46 (2) of the Act to the Collector of Kolar District to recover the amount as arrears of Land Revenue.

On December 17, 1955, the Appellate Assistant Commissioner, "A" Range, Bangalore, before whom the assessments were challenged by appeal, passed his order and assessed the income for the two years to be Rs. 28,000 and Rs. 46,000 respectively. The Income-tax Officer did not issue any fresh notices of demand under section 29 of the Act but wrote a letter demanding the reduced tax for the two years which now stood reduced to Rs. 4,215-9-0 and Rs. 13,346-8-0 respectively. It is significant that the reduction in the tax was from eighty-six thousand rupees to seventeen thousand rupees. It appears that the assessee took further appeals to the Income-tax Appellate Tribunal and the matter was said to be pending there.

The assessee then applied to the High Court under Article 226 of the Constitution for quashing the old certificates issued under section 46 (2) by the Income-tax Officer on the ground that as no fresh notices of demand were issued against him in respect of the reduced tax, he was not in default. The High Court accepted this contention and the necessary writs quashing the proceedings were issued. After

the decision of the High Court, fresh notices of demand for the reduced tax were issued to the assessee on May 8, 1959 and those proceedings were also pending. The preliminary objection which is based on the pendency of the other proceedings and particularly the last fact is really of great force, because these appeals do not now appear to serve any tangible purpose. However, the appeals were heard at length and I must express my decision on the point mooted before us.

In these appeals, the Department contends that the original notices of demand issued in September, 1955 had not become inoperative after the order of the Appellate Assistant Commissioner. The reason advanced is that there is nothing in the Income-tax Act which requires that a fresh notice of demand must issue every time the amount of tax is reduced in appeal. It is pointed out that if a previous notice of demand is not complied with, the assessee becomes a defaulter and it is submitted that he continues to be a defaulter, in respect of the balance. It is however conceded that where the Appellate Assistant Commissioner increases the assessment, a fresh notice of demand must issue. It is urged that proceedings for recovery which may have commenced are likely to become useless if fresh notices were compulsory, and it is submitted that all that is necessary, is to inform the assessee and the Collector by letters what the reduced amount is and as the default still continues, the reduced amount can straightaway be realised on the old certificates and a refund can be ordered if excess amount has already been recovered. The assessee contends that the original notice of demand lapses and with it the default and the certificate and that the Income-tax Officer is bound to issue a fresh notice of demand.

The High Court accepted the assessee's contention following a decision of the Calcutta High Court in *Metropolitan Structural Works, Ltd., v. Union of India*¹. The appellants contend that the true view of the law is contained in a later decision of the Calcutta High Court reported in *Ladluran Taparia v. D. K. Ghosh and others*² where the earlier case was explained. The appellants rely further on *The Municipal Board, Agra v. Commissioner of Income-tax, United Provinces No. 2*³, *Auto Transport Union (Private), Ltd. v. Income-tax Officer, Alwaye*⁴, and *Hiralal v. Income-tax Officer*⁵, for support.

In *Metropolitan Structural Work, Ltd. v. Union of India*¹, there were successive demand notices after the Appellate Assistant Commissioner and the Tribunal reduced the assessment and the Income-tax Officer finally sent a certificate under section 46(2) of the Act. The assessee in that case, relying upon the seventh sub-section of section 46, claimed that the proceedings were barred as according to it, the period of one year could only be calculated from the last day of the financial year in which demand was made and this could only be the first demand. It was contended by the assessee that the Act did not provide that a fresh notice should issue after revision of assessment, though it was admitted that there was no prohibition. Chakrawarti, C.J., and Lahiri, J., observed :

"The real point, however, is whether a second or a third notice of demand is at all permissible under section 29, even when an assessment is altered in a first or a second appeal. It appears to me that the necessity of issuing a fresh notice of demand in such circumstances is beyond argument."

The learned Chief Justice gave illustrations of those cases in which the earlier notice becomes "inappropriate". Addressing himself to the necessity of a new notice, the learned Chief Justice observed :

"In my view the answer to that could only be in the affirmative."

The difference between the word 'in consequence of any order' used in the Act, and 'in consequence of any assessment order in pursuance of this Act, which, he pointed out, could have easily been used, was not stressed and he held that the orders of the Appellate Assistant Commissioner and the Tribunal answered the former description. He expressed his conclusion thus :

1. A.I.R. 1956 Cal. 396.
2. I.L.R. (1958) 2 Cal. 314 : A.I.R. 1957 Cal. 667.

3. (1951) 19 I.T.R. 63 : A.I.R. 1952 All. 249.
4. (1962) 45 I.T.R. 103.
5. (1962) 45 I.T.R. 317.

"If so, when there is some tax due in consequence of an order passed by the Appellate Assistant Commissioner or in consequence of an order passed by the Appellate Tribunal, a clear occasion arises under the words of the section to serve a notice of demand upon the assessee. That such fresh notice should be issued when the assessment is altered is but common sense and I see no reason to construe the section against reason and against the actual necessities of realisation."

In the next case, *Ladhuram Taparia v. D. K. Ghosh and others*¹, the facts were the converse. There a demand notice was issued and then the tax was reduced. The assessee contended that there should be a fresh notice of demand before he was deemed to be in default. Chakrawarti, C.J., and Das Gupta, J., held that on reduction of assessment nothing further was required beyond an intimation to the assessee and the Collector of the reduction of the tax. The reason given was that the demand in respect of the excess stood 'eliminated' and the demand for the balance remained. It was held that a case of enhancement was different and it needed a fresh notice of demand. It was however not pointed out whether the fresh demand should be for the excess amount or the whole of the amount. Nor was it shown why a letter to the assessee and the Collector would not do in that case also. In either case, speaking arithmetically, a portion of the demand is saved, but speaking legally, the demand notice, to quote the words of the earlier judgment, "becomes inappropriate."

Whether the learned Chief Justice was right on the first occasion or on the second can only be said after discussing the relative sections of the Income-tax Act but this much I must say (and I say it with considerable hesitation and diffidence since I have always held that the learned Chief Justice in high esteem) that he has not been able to get clear of the words used by him on the earlier occasion. It seems anomalous that if the tax is increased from Rs. 10,000 to Rs. 10,010 a fresh notice of demand must go, that is to say the earlier default is wiped off; but if it is reduced from Rs. 10,010 to Rs. 10 a fresh notice is not required and the assessee must be deemed to be in default for Rs. 10 with all the evil consequences of default because he did not pay an extra ten thousand rupees with the ten rupees. But it may be said there is no room for logic and mathematics if the Act so requires and the true answer can only be furnished by what the law requires. Before dealing with the pertinent sections to determine how the matter stands there, I may say that the other cases of the other High Courts cited earlier do not add to the discussion, but mention must be made of *The Municipal Board, Agra v. Commissioner of Income-tax-United Provinces No. 2*². In that case, though a fresh notice of demand was served after reduction of tax under section 35 of the Income-tax Act, calculation of limitation from the date of service of that notice was not allowed because the clauses relating to right of appeal, period of limitation, etc., were pencilled through. The reason given was that section 34 (5) makes it compulsory to serve a notice of demand only when there is enhancement and as no fresh notice is made compulsory when the tax is reduced, none need issue. An assessee might, on such construction, lose his limitation for appeal in a case under section 27 of the Income-tax Act even before the order under section 27 determining the amount of tax is passed.

It is contended that there is no provision that a second or third notice of demand must issue. There is no need that the Act must expressly authorise the issue of fresh notices of demand. Even if such a power is not expressly included, it flows from section 14 of the General Clauses Act under which a power can be exercised as often as the occasion demand. I am, however, of the opinion, that (except in cases of *de minimis*) the Act does contemplate that a fresh notice of demand shall issue. There are two reasons for it. The first is the language of section 29 and the other is the consequence following the issuance of a notice of demand. I shall deal first with the second ground.

After the demand is made, the tax, penalty and interest become a debt due to the Government. This was decided a long time ago by the Privy Council in *Doorga Prasad Chamaria v. Secretary of State*³. Further, by issuing a notice of demand,

1. I.L.R. (1955) 2 Cal 314 : A.I.R. 1957 C.L. 667.

2. A.I.R. 1952 All. 249.

3. (1945) 13 I.T.R. 285 at 289; I.L.R. (1945) 2 Cal. 1 : L.R. 72 I.A. 114.

the period of limitation for appeals under section 30 of the Act starts in many cases. Further still, when the notice of demand is not complied with, the assessee can be treated as a person in default and he is liable to pay a penalty equal to the tax due under section 46 (1) of the Income-tax Act. Lastly, on the failure of the assessee to pay after a notice of demand is issued, the recovery proceedings can be started within a time limit and the amount of tax can be treated as an arrear of land revenue.

It follows, therefore, that the notice of demand is a vital document in many respects. Disobedience to it makes the assessee a defaulter. It is a condition precedent to the treatment of the tax as an arrear of land revenue. It is the starting point of limitation in two ways and the breach of obedience to the notice of demand draws a heavy penalty. The notice of demand which is issued must be in a form prescribed by rule 20 and the form includes the following particulars ; it shows the amount which has to be paid and indicates the person to whom, the place where and the time within which it has to be so paid. Compare with it section 45 of the Income-tax Act which provides :

"Any amount specified as payable in a notice of demand.....under section 29 or an order under section 31 or section 33 shall be paid within the time, at the place and to the person mentioned in the notice or order, or if a time is not so mentioned then on or before the first day of the second month following the date of the service of the notice or order, and any assessee failing so to pay shall be deemed to be in default, provided that, when an assessee has presented an appeal under section 30, the Income-tax Officer may in his discretion treat the assessee as not being in default as long as such appeal is undisposed of." (Proviso and Explanation omitted.)

From this section, it follows that an assessee is deemed to be in default if he disobeys either a notice of demand under section 29 or an order under sections 31 and 33. The contents of the notice of demand may be included in these orders and the order then serves the purposes of a notice of demand as well. In both cases, if time is not mentioned, the assessee must pay the tax on or before the first day of the second month following the date of the service of the notice or order. Once a default is incurred, it continues and the filing of an appeal does not save the assessee from the default. The Income-tax Officer can start and continue the proceedings for recovery of the tax notwithstanding the filing of the appeal. It is however to be seen that he has been given the power to treat the assessee as not in default as long as the appeal is undisposed of. This power is conferred, because section 46 (1) provides :

"When an assessee is in default in making a payment of income-tax, the Income-tax Officer may in his discretion direct that, a sum not exceeding that amount shall be recovered from the assessee by way of penalty."

To save an assessee from penalty, the Income-tax Officer may treat him as not in default but if he does not, he is within his rights.

Now take a case in which an assessee is considered to be in default after a notice of demand is served. Assume that the tax which is due is Rs. 10,010. The Income-tax Officer can, in his discretion, add another Rs. 10,010 by way of penalty and issue a certificate against him for recovery as arrears of land revenue of a sum of Rs. 20,020. Suppose the assessment is then reduced and his tax liability is found to be Rs. 10. To say that the old proceedings for the recovery of Rs. 20,020 can still be pursued in respect of Rs. 20 and the petty amount recovered as arrears of land revenue, when, if a notice of demand for Rs. 10 were sent the assessee would have paid the sum readily, is to make the law operate very harshly without any advantage. To say again that the assessee whose tax is enhanced must receive a fresh notice of demand because the old notice becomes inappropriate is to make the lot of a person whose tax is reduced worse than that of a person whose tax is increased. At least the contumacy of the latter is the same if not greater than that of the former.

It is said that all that is necessary is that the Income-tax Officer should write a letter informing the assessee that the tax is reduced from Rs. 10,010 to Rs. 10. The question is, why not send him a fresh notice of demand? If there is no provision in the Income-tax Act to send a fresh notice there is none authorising the sending

of letters. No doubt, the old proceedings for recovery of the tax might become out of date and inappropriate, but it is one thing to use coercion to recover an amount which the assessee did not but probably could not pay, and another to recover an amount which the assessee could and would pay readily. However, if the law requires that a notice of demand need not go, that would be the end of the matter ; but, in my opinion, section 29 in its terms is extremely clear and indicates that a notice of demand must always issue.

It reads :

“ When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable.”

The learned Chief Justice of the Calcutta High Court, if I may say respectfully, was perfectly right in pointing out its meaning in his first case. I cannot add to what he said and I adopt all he said. But I would add a few words. The mandatory part of the section is quite clear. “ The Income-tax Officer shall serve a notice of demand upon the assessee ” are emphatic words and the earlier part shows that he has to do it when tax is due in consequence of “ any order ”. Any order means not only an order passed by himself, but also an order passed by reason of the success of an appeal which the assessee may file and in which the old assessment is set aside. In view of the consequences that ensue, it is clear to me that when an assessment is gone through a second time and the amount of tax is reduced, the Income-tax Officer must intimate to the assessee the reduced amount of tax and make a demand and give him an opportunity to pay before treating him as a defaulter. This is incumbent because the assessment resulting in the tax is itself set aside or modified and an assessee is entitled to a proper assessment and ascertainment of tax before a demand can be made on him.

It is said that the Income-tax Officer can send a letter but the law says that he “ shall serve upon the assessee a notice of demand in the prescribed form ”. When the law requires that a notice of demand should issue the mode of compliance by a letter is excluded. It may be that the letter is a good substitute for a notice of demand but the section demands that it should be “ in the prescribed form ”. If a letter is to be written, why not a notice of demand ? In other words, when the assessment is altered, whether it is reduced or it is increased, by reason of *any order* under the Act, it is the duty of the Income-tax Officer to issue a notice of demand in the prescribed form and serve it upon the assessee. The learned Chief Justice of the Calcutta High Court clearly was of the view in the first case that there was only one answer to the question and I respectfully agree with him. He could only depart from his earlier view by finding fault with the drafting of section 45. I regret I cannot agree with him there. Section 45 intends that the order of the Appellate Assistant Commissioner and the Tribunal may in some cases also serve as notices of demand. Further it is not clear from the later decision whether on the enhancement of the tax, a fresh notice of demand is required for the excess only or the whole of the sum. That answer is not furnished in any of the other cases to which reference was made at the Bar. If default is saved in respect of the reduced amount, a default would also be saved in respect of the original amount when the demand is increased. If a notice of demand were to issue in respect of the excess only, there will be two notices of demand and two starting points of limitation, both for the purpose of coercive action under section 46 (7) as well as for purposes of any appeal that might lie. If however, a fresh notice of demand is to go in respect of the composite sum, the question to ask would be, what happens to the default which was incurred already ? How does it disappear ? In my opinion, there is only one possible answer and it was given by the learned Chief Justice in the earlier case.

I would therefore dismiss these appeals and all the more readily because a fresh notice of demand has issued in this case. If it is disobeyed, the Income-tax Officer would be able to recall the old certificate issued to the Revenue Officer, amend it and bring it in line with the tax now demandable and return it to him for continuing the recovery proceedings.

I would dismiss the appeals but in the circumstances of the case, I would make no order about costs.

Shah, J.—The Income-tax Officer, Kolar Circle, Kolar, assessed Seghu Buchiah Setty—respondent in this appeal—to income-tax under section 23 (4) of the Indian Income-tax Act, 1922, for the year 1953-54 on an estimated income of Rs. 61,000 and for the year 1954-55 on an estimated income of Rs. 1,21,000 and served notices of demand under section 29 of the Act for the tax due under the two orders of assessment. On the respondent failing to comply with the notices of demand within the period specified, the Income-tax Officer treated the respondent as in default and sent certificates under section 46 (2) of the Act to the Deputy Commissioner, Kolar, for recovery of the tax determined by the orders of assessment. The Deputy Commissioner attached certain properties belonging to the respondent. In appeals filed by the respondent against the orders of assessment the Appellate Assistant Commissioner reduced the income assessed for the year 1953-54 to Rs. 28,000 and for the year 1954-55 to Rs. 46,000. The Income-tax Officer did not issue fresh notices of demand pursuant to the modification in the orders of assessment made by the Appellate Assistant Commissioner, but by his letter dated 14th February, 1956, informed the respondent that he had to pay tax as reduced by the appellate order. The respondent did not pay the amount of tax demanded, and applied to the High Court of Mysore under Article 226 of the Constitution for a writ *certiorari* quashing the certificates issued by the Income-tax Officer treating him as in default and a writ *prohibition* prohibiting the Income-tax Officer from enforcing the certificates under section 46 (2) of the Income-tax Act. The High Court of Mysore relying upon the judgment of the Calcutta High Court in *Metropolitan Structural Works, Ltd. v. Union of India*¹, held that the Income-tax Officer could not, without issuing fresh notices of demand, after the Appellate Assistant Commissioner of Income-tax reduced the taxable income, setting out the tax payable by him for the two years in question, treat the respondent as a defaulter and that the proceedings of the Collector based on the certificates issued pursuant to the order of assessment by the Income-tax Officer were illegal. Against the orders passed by the High Court, the Income-tax Officer has appealed to this Court, with Special Leave.

The question which falls to be determined in this appeal is about the legal effect of the reduction of the assessable income by the order of the Appellate Assistant Commissioner on the notices of demand previously issued by the Income-tax Officer. The respondent contends that by the modifications made in the orders of assessment the notices of demand issued by the Income-tax Officer must be deemed cancelled or superseded, and he cannot be regarded as in default, unless fresh notices of demand are issued by the Income-tax Officer specifying the amount payable pursuant to the appellate order. The respondent says that there was at the material time no outstanding demand notice or order specifying the amount payable, failure to comply with which may be regarded as constituting a default. The respondent strongly relies upon the observations made by Chakravarti, C.J., in his judgment in *Metropolitan Structural Works, Ltd.'s Case*¹, that where the income assessed by the Income-tax Officer is reduced in appeal, the notice of demand issued by the Income-tax Officer in respect of the income assessed by him will on such reduction cease to be appropriate, such being the meaning of the statute and any interpretation to the contrary is "against reason" and "against the actual necessities of realisation".

The respondent therefore submits that an order of the Appellate Assistant Commissioner in appeal not only supersedes the order of assessment against which the appeal is carried, but also the notice of demand issued by the Income-tax Officer and all proceedings taken for recovery of tax in pursuance of the notice of demand, and therefore default which has resulted from the failure to comply with the notice of demand becomes inoperative, when the Appellate Assistant Commissioner passes his order in appeal against the order of assessment, whether such order is of confirmation or variance. The Income-tax Officer may, submits the respondent, issue a

1. (1955) 28 I.T.R. 432 : A.I.R. 1956 Cal. 395.

certificate under section 46 if there be a fresh default resulting from non-compliance of the order of the Appellate Authority. If this submission is true, the demand notices must be issued and all steps pursuant to an order of assessment for recovery must be completed before the appeal against the order of assessment is disposed of. If the proceedings are not completed, they will be superseded by the order passed by the Appellate Authority.

We may examine the correctness of the plea raised by the respondent in the light of the scheme for recovery of tax, penalty or interest due under the provisions of the Act. After the income of an assessee is computed, and liability to pay tax, penalty or interest is determined in the manner provided by the Act, proceedings for recovery of the amount commence. A notice of demand is the foundation of such proceedings and of the jurisdiction to collect the tax. It is the notice of demand which converts the liability determined by the order of assessment into a debt due by the assessee to the State. There must therefore be a valid order of assessment, on which a notice of demand may be founded. Section 29 invests the Income-tax Officer alone with jurisdiction to issue a notice of demand, and no other Officer out of the hierarchy of Revenue Officers has that jurisdiction. It provides :

"When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice in the prescribed form specifying the sum so payable."

The notice of demand has to be in the Form prescribed under rule 20 which requires that the amount demanded, and the person to whom together with the place where it is to be paid, must be stated in the notice. Section 45 of the Act provides that the amount specified as payable in the notice of demand or an order under section 31 or section 33 shall be paid within the time, at the place and to the person mentioned therein, or if no time be so mentioned, then on or before the 1st day of the second month following the date of the service of the notice or order and if the assessee fails to pay the tax he shall be deemed to be in default, unless the assessee has presented an appeal under section 30 of the Income-tax Act and the Income-tax Officer in his discretion treats the assessee as not being in default as long as such appeal is undisposed of. Section 45 therefore prescribes the conditions under which a person may be treated as in default. Section 46 provides the mode and time of recovery of the amount due by an assessee. Sub-sections (2) to (6) of section 46 lay down the method which may be adopted for recovery of the dues. Sub-section (2) authorises the Income-tax Officer to forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee. The Collector, on receipt of such certificate has to proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue. Sub-sections (3) to (6) deal with other modes of recovery : But resort to the modes of recovery is subject to sub-section (7) which provides that save in accordance with the provisions of sub-section (1) of section 42, or of the Proviso to section 45, (which are for the purposes of this case not material) no proceedings for recovery of any sum payable under the Act shall be commenced after the expiration of one year from the last day of the financial year in which a demand is made under the Act. The Act therefore provides that if an assessee makes default in complying with the notice of demand or order under sections 31 or 33, proceedings may be taken in the manner provided in section 46 for recovery of the tax due but such proceedings shall not be commenced after the expiration of the period specified in sub-section (7).

By the determination of tax under section 23, or imposition of penalty in circumstances mentioned in section 28, or liability for payment of interest in circumstances mentioned in section 18-A (4), (6), (7) or (8) obligation to pay tax, penalty or interest arises, and upon service of a notice of demand under section 29 or an order under section 31 or section 33, the tax, penalty or interest become due and payable, and if the tax is not paid within the time specified, the assessee must, unless the Income-tax Officer otherwise directs, be treated as in default. Against the assessee in default, the Income-tax Officer may take appropriate steps for recovery of tax as prescribed in clauses (2) to (6) of section 46. But the Legislature has not enacted

that steps taken by the Income-tax Officer for recovery of tax will lapse or be superseded when the appeal against the order of assessment passed by the Income-tax Officer is disposed of by the Appellate Authority. Section 45 in terms provides that when an assessee is served with the notice of demand and has failed to comply with the notice, he shall, unless otherwise ordered, be deemed to be a defaulter. The Act provides a right of appeal against the order of assessment, but on the presentation of the appeal the power of the Income-tax Officer to take steps for recovery of tax is not suspended. The Income-tax Officer is obliged by the statute to issue a notice of demand for payment of tax, penalty or interest due in consequence of any order passed under or in pursuance of the Act. Lodging of an appeal does not operate as a stay and would not entitle the assessee to withhold payment of tax till the appeal is decided. The Income-tax Officer may in his discretion treat the assessee as not in default as long as such appeal is not disposed of, but unless such an order is passed the assessee would, on failure to comply with the order, be a defaulter and proceedings for recovery of tax may be initiated and continued during the pendency of the appeal.

It is clear therefore that when tax, penalty or interest is determined and demanded, proceedings shall be commenced for recovery, and these proceedings may be commenced and continued, notwithstanding the presentation of an appeal. By failing to comply with the demand the assessee becomes a defaulter, and it is not provided that he shall cease to be a defaulter on the disposal by the Appellate Authority of the appeal against the order of assessment. In the absence of such a provision, it is difficult to perceive any ground for holding that the proceedings commenced against a defaulting tax-payer for recovery of tax must be abandoned, and fresh proceedings commenced for recovery of tax pursuant to the order of the Appellate Authority. If on the passing of an order by the Appellate Authority, the notice of demand previously issued is deemed to be cancelled or superseded, an assessee must be treated as absolved from the consequences of his default even if the Appellate Authority confirms the order of the Income-tax Officer, because the earlier default by the taxpayer will in every case go by the board, and the proceedings must be commenced again after service of a fresh notice of demand, the discretion vested in the Income-tax Officer to treat or not to treat an assessee pending appeal in default will, in all cases be valueless. The provisions of the Act do not indicate any such legislative intent and express enactment conferring upon the Income-tax Officer, in his exercise of discretion, power not to treat a person who has preferred an appeal as a defaulter, contains strong indication to the contrary. Therefore, in my view a person who has failed to comply with a notice of demand would continue to be a defaulter notwithstanding the reduction of liability by order of the Appellate Authority. There would be only one exception to this rule *i.e.*, when the order of assessment is wholly set aside. But that is not a real exception, for against the assessee no steps can be taken because there is no debt due by him.

It was urged that a person can be said to be in default in payment of tax, when he fails to comply with a demand for a specific amount, and when the amount payable by him is reduced in appeal, he is no longer in default because he has had no opportunity to meet the reduced demand. But the status of a defaulter under the Act is a condition for initiation of proceedings for recovery, and by the reduction of liability in appeal the status is not altered. Even if the amount due is modified, the status persists, but the process for recovery will be adjusted according to the modified demand including the imposition of penalty under section 46 (1). It is true that the Act contains no express provisions which enables the Income-tax Officer to modify the certificate which is issued to the Collector, but the absence of such a provision does not detract from the duty of the Income-tax Officer to give information to the recovering authority about the reduction in the liability for tax, penalty or interest made by the Appellate Authority and to request such authority to adjust his proceeding to the modified demand. Such a duty must necessarily be implied. An error in the certificate can always be clarified by an amendment and if that power be granted, there is no reason to suppose that a demand which is reduced because of

subsequent events, such as modification of the assessment by the Appellate Authority, or payment made by the tax-payer as directed by the notice of demand may not be enforced in a manner consistent with the outstanding demand. If in an appeal the Appellate Assistant Commissioner enhances the tax, the Income-tax Officer may give intimation to the recovering authority about the enhanced demand. No fresh notice is contemplated to be given by the Act in the case either of reduction of assessment or enhancement. The plea that a fresh notice of demand may have to be issued when the assessment is enhanced is not warranted by the statute, and the argument that against the assessee two notices of demand may in certain cases be issued, failure to comply with which may make him doubly a defaulter has no valid basis.

Counsel for the respondent urged that it is open to the Appellate Assistant Commissioner to specify by his order the time and place at which the tax determined by him is to be paid, and the person to whom it is to be paid. If the Appellate Assistant Commissioner does not so specify the amount, the person to whom and the place at which the payment is to be made, the order of the Income-tax officer would be deemed to be superseded and it would be the duty of the assessee then to pay the tax determined pursuant to the order of the Appellate Authority after a fresh notice is served upon him and he cannot be deemed to be in default unless he has failed to comply with the directions of the Appellate Assistant Commissioner within the period prescribed by that order. *Section 45 does undoubtedly refer to the amount specified in an order passed under section 31 which deals with the procedure and the power of the Appellate Assistant Commissioner hearing an appeal from the order of the Income-tax Officer—and to the amount specified in an order under section 33 dealing with the procedure and the powers of the Income-tax Appellate Tribunal in appeal against the order of the Appellate Assistant Commissioner, and provides that default in payment of the amount so specified can only arise if it is not paid within the time at the place and to the person mentioned in the order under section 31 or section 33 or in the demand notice under section 29. But sections 31 and 33 do not provide that in making their respective orders the Appellate Assistant Commissioner and the Appellate Tribunal shall determine the tax, penalty or interest, and shall also prescribe the time within which, the person to whom, and the place at which the amount specified shall be paid, and it would be difficult to accept the contention that the Legislature in enacting section 45—a provision relating to recovery of tax intended to provide that in exercise of the appellate power, the Appellate Assistant Commissioner and the Income-tax Tribunal shall comply with certain requirements. In certain exceptional cases such as those in which an appeal is filed only against the amount of tax determined under section 23 or against imposition of penalty under section 28 or against orders specifying the amount of interest payable under section 18-A. the Appellate Assistant Commissioner or the Tribunal may, in their final orders, specify the amount to be paid and also the time within which and the place at which and the person to whom the amount is to be paid. Such a direction is intended only to effectuate in appropriate cases the order of the Appellate Assistant Commissioner or the Tribunal. It does not take the place of a notice of demand, but if made, may operate if not complied with to make the person liable to pay the amount specified a defaulter. An Appellate Assistant Commissioner may, in an appeal against the order of the Income-tax Officer, either confirm the assessment or modify it by reducing or increasing it. Similarly the Tribunal may confirm the assessment of the Appellate Assistant Commissioner or may reduce the assessment. But the Appellate Assistant Commissioner and the Tribunal are not required by statute to specify the amount as payable in their order, nor are they required to direct payment to be made in their order.*

The Appellate Assistant Commissioner and the Tribunal have power to impose penalty in the conditions specified in clauses (a), (b) or (c) of sub-section (1) of section 28 of the Income-tax Act. But these orders are passed in exercise of their appellate jurisdiction conferred by sections 31 and 33 of the Act and where the Appellate Assistant Commissioner imposes penalty he may specify the amount thereof. Similarly the Tribunal imposing penalty may specify the amount of penalty. To such cases the provision relating to default arising on failure to comply with the direc-

tions to pay may apply if the person to whom, and the place at which, it is to be paid are specified.

The assumption that section 45 of the Income-tax Act requires the Appellate Authority to specify the amount payable in the order therefore seems to be unwarranted and the fact that under certain circumstances, having regard to the nature of the order appealed from, the Appellate Authority may specify in the order such particulars, does not justify the interpretation either that the Income-tax Officer has the power to issue the notice of demand only in those case where by inadvertance the Appellate Assistant Commissioner or the Tribunal have failed to specify the amount payable or that the passing of orders by the Appellate Assistant Commissioner or the Tribunal deciding the appeal has the effect of superseding the notices of demand issued by the Income-tax Officer. In the absence of any provision imposing an obligation upon the Income-tax Officer to issue successive notices of demand from time to time for recovery of the amount due during the process of assessment, it must be held that the notices of demand issued by the Income-tax Officer in exercise of the power under section 29 may be enforced in the manner provided by section 46 and within the period of limitation provided in clause (7) of section 46, even after the appeal against the order of assessment by the Income-tax Officer is disposed of, subject to adjustment of the amount to be recovered in the light of the order of the Appellate Assistant Commissioner.

Observations made by Chakravarti, C.J., in the case in *Metropolitan Structural Works Ltd.'s case*¹, do lend support to the argument that the issue of a fresh notice on modification by the Appellate Authority was a "matter of reason" and "based on the actual necessities of realisation" and that it is obligatory upon the Income-tax Officer to issue such a notice on every occasion when the assessment was modified. But the learned Chief Justice himself explained the observations in his judgment in *Ladhuram Taparia v. D. K. Ghosh and others*², and pointed out that in *Metropolitan Structural Works Ltd.'s case*¹, the sole question which fell to be determined was as to the commencement of the period of limitation under section 46 (7) for enforcement of a notice of demand when successive notices of demand were in fact issued by the Income-tax Officer, and that the earlier judgment was not intended to lay down and did not lay down that the Income-tax Officer was under an obligation to issue a fresh notice of demand merely because the Appellate Assistant Commissioner had modified the assessment. Chakravarti, C.J., after referring to the contention which was advanced and his observations regarding the necessity of issuing a fresh notice of demand where the earlier notice had become inappropriate by reason of reduction in the amount of the tax payable observed at page 422 :

"To say that was not to say that a necessary modification of the demand could only be made by issuing a second notice under section 29 and could not be made in any other way, or to put it in other words, it was not to say that the necessity of issuing a fresh notice of demand was an invariable and imperative necessity. * * * I am altogether unable to see how that decision can be construed as having laid down that whenever an assessment order was modified by an appellate order, an obligation arose to issue a second notice of demand under section 29, if the modified amount was sought to be made payable and if it was sought to establish that a default in respect of the modified demand has been committed."

The observations of Chakravarti, C.J., in *Metropolitan Structural Works Ltd.'s case*¹, relating to the necessity of issuing a fresh notice on the modification of the assessment were somewhat wide and literally read may support the argument advanced by the Counsel for the respondent in this case, but they were, in my judgment, unnecessary for the purpose of deciding the case and did not correctly interpret the provisions of sections 29, 45 and 46. The view which has been expressed by Chakravarti, C.J., in *Ladhuram Taparia's case*², has been adopted in other cases as well: *Auto Transport Union (Private) Ltd. v. Income-tax Officer, Alwaye*³ and *Hira Lal v. Income-tax Officer and Mali Ram v. Collector of Bhilwara*⁴. In my view the validity

1. (1958) 28 I.T.R. 432.

3. (1962) 45 I.T.R. 103.

2. A.I.R. 1957 Cal. 667 : I.L.R. (1958) 2 Cal. 314 : (1958) 33 I.T.R. 407 (422).

4. (1962) 45 I.T.R. 317.

of a certificate issued under section 46 (2) to the Collector for recovery of tax must depend upon the power of the Income-tax Officer to issue that notice. That power may be exercised only if the assessee is a defaulter, and the proceedings are commenced within the period provided in section 46 (7). If because of failure to comply with the notice of demand issued by the Income-tax Officer the assessee is in default, I fail to appreciate how such a person can be regarded as not in default, merely because the order of assessment is modified but is not vacated. The High Court was, therefore, in error in holding that it was necessary to issue a fresh notice of demand, if the Appellate Assistant Commissioner modified the assessment so as to reduce the amount of tax due and unless such a notice was issued, the assessee could not be regarded as in default.

The appeal will therefore be allowed and the petition filed by the respondent will stand dismissed with costs in this Court and the High Court.

ORDER OF THE COURT :—By order of the majority, the appeals are dismissed. But there will be no order as to costs.

V.S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, J. L. KAPUR, A. K. SARKAR, M. HIDAYATULLAH AND RAGHUBAR DAYAL, JJ.

The Maharaja Shree Umaid Mills, Ltd. (In both the Appeals) .. *Appellant**

v.

The Union of India and others (In both the Appeals) .. *Respondents.*

Constitution of India (1950), Article 295 (1) (b)—Scope—Rajasthan Excise Duties Ordinance (XXV of 1949) and Rajasthan Ordinance (I of 1949)—Agreement between the Ruler of State and the subject—Exemption of duties and tax—Whether amounts to a law—If a legislative contract—Enforceability against the Union Government—No violation of Article 19 or Article 31—Act of State—No implied or express recognition of agreement.

Every order of a Sovereign Ruler who combines in himself all legislative, executive and judicial functions cannot be treated as law irrespective of the nature or character of the order passed. The true nature of the order must be taken into consideration, and the order to be law must have the characteristics of law, that is, of binding rule of conduct as the expression of the will of the Sovereign which does not derive its authority from mere consensus of mind of two parties entering into a bargain.

A contract is essentially a compact between two or more parties; a law is not an agreement between parties but is a binding rule of conduct deriving its sanction from the Sovereign Authority. There is a valid distinction between a particular agreement between two or more parties even if one of the parties is the Sovereign Ruler, and the law relating generally to agreements. The former rests on consensus of mind and the latter expresses the will of the Sovereign.

Nobody could envisage in 1941 the constitutional developments which took place in 1947-50 and when the parties talked of Federal excise duty and Federal income-tax, they had in mind the scheme of federation envisaged by the Government of India Act, 1935—which scheme never came into operation. It is difficult to see how the agreement in any view of the matter can be treated as law in respect of a tax or duty imposed by the Union Government when there is no mention of it therein.

A contract is a compact between two or more parties and is either executory or executed; if a statute adopts or confirms it, it becomes law and is no longer a mere contract. That is all that a 'legislative contract' means. In the instant cases there is no legislative contract.

In the absence of any term as to exemption from excise duty or income-tax to be imposed by the Union Legislature, the question of succeeding Sovereigns accepting such a term and an obligation arising therefrom on 26th January, 1950 by means of Article 295 (1) (b) of the Constitution cannot at all arise. A term or undertaking which is non-existent cannot give rise to right or obligation in favour of or against any party. The claim of the appellant can be rejected on this short ground.

It is now well settled that an "act of State" is the taking over of Sovereign powers by a State in respect of territory which was not till then part of it, by conquest, treaty, cession or otherwise and the municipal Courts recognized by the new Sovereign have the power and jurisdiction to investigate

and ascertain only such rights as the new Sovereign has chosen to recognise or acknowledge by legislation, agreement or otherwise ; and that such a recognition may be express or may be implied from circumstances.

Neither the United State of Rajasthan nor the State of Rajasthan affirmed the agreement. There was no enforceable right against these States. If the right itself did not exist before the commencement of the Constitution, there would be no question of its vesting in another Government under Article 295 (1) (b).

There is nothing in Article 295 which expressly prohibits Parliament from enacting a law as to income-tax or excise duty in territories which became Part B States, and which were formerly Indian States, and such a prohibition cannot be read into Article 295 by virtue of some contract that might have been made by the then Ruler of Indian State with any person.

Article 19 or Article 31 of the Constitution cannot be called in aid, if the right itself did not survive.

Obiter : In view of the very clear words of section 30 of the Rajasthan Excise Duties Ordinance, 1949 and of the repealing provisions in the Finance Act, 1950 it would be difficult to hold that the earlier special law on the subject still continued in force.

Appeal from the Judgment and Order dated the 19th October, 1953 of the Rajasthan High Court in D.B. Civil Misc. Writ No. 47 of 1953 with

Appeal from the Judgment and Decree dated the 7th May, 1959 of the Rajasthan High Court in D.B. Civil Regular First Appeal No. 10 of 1955.

G. S. Pathak, Senior Advocate (*Rameshwar Nath, S. V. Andley and P. L. Vohra, Advocates of M/s. Rajinder Narain & Co., with him*), for Appellant (In both the Appeals).

M. C. Setalvad, Attorney-General for India, H. N. Sanyal, Additional Solicitor-General of India, and K. N. Rajagopal Sastri, Senior Advocate (*R. N. Sachthy, Advocate, with them*), for Respondents (In C.A. No. 214 of 1956) and Respondents Nos. 1, 3 and 4 (In C.A. No. 399 of 1960).

G. C. Kasliwal, Advocate-General for the State of Rajasthan and M. M. Tiwari, Senior Advocate (*S. K. Kapur, Kan Singh, S. Venkatakrishnan and K. K. Jain, Advocates, with them*), for Respondent No. 2 (In C.A. No. 399 of 1960).

The Judgment of the Court was delivered by

S. K. Das, J.—These two appeals on certificates granted by the High Court of Rajasthan have been heard together, because they raise common questions of law and fact and this judgment will govern them both.

Shortly put, the main question in C.A. No. 399 of 1960 is whether the appellant, the Maharaja Shree Umaid Mills, Ltd., is liable to pay excise duty on the cloth and yarn manufactured and produced by it, in accordance with the provisions of the Central Excises and Salt Act, 1944 which provisions were extended to the territory of the State of Rajasthan on 1st April, 1950. The main question in C.A. No. 214 of 1956 is whether the same appellant is liable to pay income-tax in accordance with the provisions of the Indian Income-tax Act, 1922 from the date on which those provisions were extended to the territory of the State of Rajasthan. C.A. No. 399 of 1960 arises out of a suit which the appellant had filed in the Court of the District Judge, Jodhpur. That suit was dismissed by the learned District Judge. Then there was an appeal to the High Court of Rajasthan. The High Court of Rajasthan dismissed the appeal. The High Court was then moved for a certificate under Articles 132 (1) and 133 (1) of the Constitution. Such certificate having been granted by the High Court, the appeal has been preferred to this Court. C.A. No. 214 of 1956 arises out of a writ petition which the appellant had filed for the issue of a writ of *mandamus* or any other appropriate writ restraining the respondents from assessing or recovering income-tax from the appellant. This writ petition was dismissed by the High Court on the preliminary ground that the appellant had another remedy open to it under the provisions of the Income-tax Act, 1922. The appellant moved the High Court and obtained a certificate in pursuance of which it has filed C.A. No. 214 of 1956. As we are deciding both the appeals on merits, it is unnecessary to deal with the preliminary ground on which the High Court dismissed the writ petition.

We have already stated that in both the appeals the Maharaja Shree Umaid Mills, Ltd., Pali, is the appellant. In C.A. No. 399 of 1960 the respondents are the

Union of India, the State of Rajasthan, the Collector of Central Excise, New Delhi and the Superintendent, Central Excise, Jodhpur. In C.A. No. 214 of 1956, the respondents are the Union of India, the State of Rajasthan, the Commissioner of Income-tax, Delhi and the Income-tax Officer, Jodhpur.

We may now state the facts which are relevant to these two appeals. The appellant was incorporated under the Marwar Companies Act, 1923 and has its registered office at Pali in the present State of Rajasthan. It has been manufacturing cloth and yarn since 1941. The case of the appellant was that the then Ruler of the State of Jodhpur was earnestly desirous of having a cotton mills started at Pali and for that purpose agreed to give certain concessions by way of immunity from payment of taxes and duties then in force in the Jodhpur State or likely to come into force in view of the contemplated federation of the Indian States and Provinces under the Government of India Act, 1935. There were negotiations and correspondence about the concessions which were to be granted and finally a formal deed of agreement incorporating the concessions and immunities granted was executed between the Government of His Highness the Maharaja of Jodhpur on one side and the appellant on the other on 17th April, 1941. Clause 6 of this agreement, in so far as it is relevant for our purpose, said :

"The State will exempt or remit the following duties and royalties :

- | | | | | | | |
|-------|---|---|---|---|---|---|
| (a) * | * | * | * | * | * | * |
| (b) * | * | * | * | * | * | * |
| (c) * | * | * | * | * | * | * |
| (d) * | * | * | * | * | * | * |

- (e) State or Federal excise duty on goods manufactured in the mill premises. If any such duty has to be paid by the company the State will refund the same wholly to the company.
- (f) State or Federal income-tax or super-tax or surcharge or any other tax on income—If any such tax has to be paid by the company the State will refund the same wholly to the company.

(g) *

In consideration of the concessions given the appellant agreed to pay to the State of Jodhpur, a royalty of $7\frac{1}{2}$ per cent. on the net profits of the company in each of its financial years, such payments to be made within three months after the close of each financial year. This agreement, it was stated, was acted upon by the State of Jodhpur and the appellant enjoyed an immunity from excise duty and income-tax. The Indian Independence Act, 1947 brought into existence as from 15th August, 1947 a Dominion of India. The Ruler of Jodhpur acceded to the Dominion of India by means of an Instrument of Accession in the form referred to in Appendix VII at pages 165 to 168 of the White Paper on Indian States. Jodhpur was one of the Rajputana States. The integration of these States was completed in three stages. Firstly, a Rajasthan Union was formed by a number of smaller Rajputana States situated in the south-east of that region. Later, there was formed the United State of Rajasthan. The Ruler of Jodhpur joined the United State of Rajasthan and on 7th April, 1949 made over the administration of his State to the Rajpramukh of the United State of Rajasthan. The Covenant by which this was done is Appendix XL at pages 274 to 282 of the White Paper. On the same day was promulgated the Rajasthan Administration Ordinance, 1949 (Ordinance I of 1949), section 3 whereof continued all the laws in force in any covenanting State until altered or repealed or amended by a competent Legislature or other competent authority, etc. There was a fresh Instrument of Accession on 15th April, 1949 on behalf of the United State of Rajasthan by which the United State of Rajasthan accepted all matters enumerated in List I and List III of the Seventh Schedule to the Government of India Act, 1935 as matters in respect of which the Dominion Legislature might make laws for the United State of Rajasthan; there was a proviso, however, which said that nothing in the said Lists shall be deemed to empower the Dominion Legislature to impose any tax or duty in the territories of the United State of Rajasthan or to prohibit the imposition of any

duty or tax by the Legislature of the United State of Rajasthan in the said territories. On 5th September, 1949 was promulgated the Rajasthan Excise Duties Ordinance, 1949 (Ordinance XXV of 1949). This Ordinance was published on 19th September, 1949 and section 34 thereof said that all laws dealing with matters covered by the Ordinance in force at its commencement in any part of Rajasthan were repealed. One of the questions before us is whether this section had the effect of abrogating the agreement dated 17th April, 1941 in case that agreement had the force of law in the State of Jodhpur. On 23rd November, 1949 the United State of Rajasthan made a proclamation to the effect that the Constitution of India shortly to be adopted by the Constituent Assembly of India shall be the Constitution for the Rajasthan State. The Constitution of India came into force on 26th January, 1950 and as from that date Rajasthan became a Part B State.

For the purpose of these two appeals, we have to notice the three stages of evolution in the constitutional position. First, we have the State of Jodhpur whose Ruler had full sovereignty and combined in himself all functions, legislative, executive and judicial. Then we have the United State of Rajasthan into which Jodhpur was integrated as from 7th April, 1949 by the Covenant, Appendix XL at pages 274 to 282 of the White Paper. Lastly, we have the Part B State of Rajasthan within the framework of the Constitution of India which came into force on 26th January, 1950. Jodhpur then became a part of the Part B State of Rajasthan.

Both duties of excise (except alcoholic liquors, etc.) and taxes on income other than agricultural income fall within List I of the Seventh Schedule of the Constitution of India. By section 11 of the Finance Act, 1950, the provisions of the Central Excises and Salt Act, 1944 and all Rules and Orders made thereunder were extended to the territory of Rajasthan as from 1st April, 1950. The Excise officers of the Union of India recovered a sum of Rs. 4,05,014-12-0 as excise duty for the goods manufactured and produced by the appellant, for the period from 1st April, 1950 to 31st March, 1952 from the appellant. The appellant said that it paid the amount under protest. On 16th April, 1952 the appellant instituted a suit by means of a plaint filed in the Court of the District Judge, Jodhpur. In the plaint the appellant made several averments on the basis of which it claimed that the respondents were not entitled to realise excise duty from the appellant by reason of the agreement dated 17th April, 1941. The appellant asked for the following reliefs :—

- (a) A declaration that the agreement, dated 17th April, 1941 is binding on all the respondents;
- (b) that the amount of excise duty already realised be refunded with interest at 6% per annum;
- (c) that the Union of India and the State of Rajasthan and their servants, agents and officers be permanently restrained by means of an injunction from realising any excise duty from the appellant; and
- (d) that the State of Rajasthan be directed to refund from time to time as and when the appellant is to pay excise duty to the Union of India, by reason of the indemnity clause in the agreement of 17th April, 1941.

Several issues were framed by the learned District Judge who on a trial of those issues substantially held that the agreement of 17th April, 1941 was not binding on the respondents. He further held that the agreement itself stood frustrated by reason of subsequent events which happened and was therefore unenforceable. There was an appeal to the High Court which affirmed the main findings of the learned District Judge.

The facts in C.A. No. 214 of 1956 are the same as those given above, the only point of distinction being that this appeal relates to income-tax while the other relates to excise duty. Here again the appellant bases its claim on the agreement dated 17th April, 1941 and contends that the agreement is binding on the respondents and the appellant cannot be asked to pay income-tax by reason of the provisions of the Indian Income-tax Act, 1922 which were extended to the whole of India except the State of Jammu and Kashmir as a result of certain amendments inserted in the said Act by the Finance Act, 1950.

On behalf of the appellant two main lines of argument have been presented before us in support of the contention that the agreement dated 17th April, 1941 is binding on the respondents and the finding to the contrary by the Courts below is incorrect. The first line of argument is that the agreement of 17th April, 1941 is itself law, being the command of the Ruler of Jodhpur who was a Sovereign Ruler at that time and combined in himself all legislative, executive and judicial functions. This law, or legislative contract as learned Counsel for the appellant has put it, continued in force when Jodhpur merged into the United State of Rajasthan, by reason of section 3 of the Rajasthan Administration Ordinance, 1949 which continued all existing laws in any covenanting State in force immediately before the commencement of the Ordinance. It is pointed out that for the purpose of section 3 aforesaid, "law" means any rule, order or bye-law which having been made by a competent authority in a covenanting State has the force of law in that State. The agreement of 17th April, 1941, it is argued, was sanctioned by the Ruler and was his order; therefore, it had the force of a special law in Jodhpur and this law continued to be in force by reason of section 3 of the Ordinance referred to above. When the Rajpramukh of the United State of Rajasthan promulgated the Rajasthan Excise Duties Ordinance, 1949 (Ordinance XXV of 1949), section 30 thereof did not abrogate the special law embodied in the agreement. On the coming into force of the Constitution on 26th January, 1950 when Rajasthan became a Part B State, Article 372 of the Constitution applied and the special law continued in force. The Finance Act, 1950 did not abrogate the special law. Therefore, the special law still continues in force and binds the respondents. This is the first line of argument.

The second line of argument proceeds on the footing that the agreement of 17th April, 1941 is purely contractual in nature and is not law. Even on that footing, learned Counsel for the appellant argues, the contract in question gives rise to rights in one party and obligations on the other. These rights and obligations, it is stated, were accepted by each succeeding Sovereign, (1) Jodhpur State, (2) United State of Rajasthan and (3) the Part B State of Rajasthan. It is contended that the finding to the contrary by the Courts below is wrong. As the rights and obligations were accepted by each succeeding Sovereign, Article 295 (1) (b) of the Constitution came into play as from 26th January, 1950 and the rights and liabilities of the Jodhpur State or of the United State of Rajasthan became the rights and liabilities of the Government of India in so far as these rights and liabilities were for the purposes of the Government of India relating to any of the matters enumerated in the Union List. Learned Counsel for the appellant argues that Article 295 is of the nature of a constitutional guarantee and any law made in violation thereof must be void to the extent that it violates the Article.

Apart from the aforesaid two main lines of argument, learned Counsel for the appellant has also submitted that the contract in question being a right to property, the appellant could not be deprived of it in violation of its guaranteed rights under Articles 19 and 31 of the Constitution; that there was no frustration of the contract as found by the learned District Judge; and that in any view the appellant is entitled to a refund of the duty or tax paid by it to the Union Government from the State of Rajasthan by reason of clause 6 of the agreement.

We proceed now to deal with these arguments in the order in which we have stated them. As to the first line of argument we have come to the conclusion that the agreement of 17th April, 1941 rests solely on the consent of the parties; it is entirely contractual in nature and is not law, because it has none of the characteristics of law. Learned Counsel for the appellant has relied on the decisions of this Court in *Amer-un-nissa Begum v. Mahboob Begum*¹, *Director of Endowments Govt. of Hyderabad v. Akram Ali*², *Madhavrao Phalke v. The State of Madhya Bharat*³, and *Promed Chandra Deb and others v. The State of Orissa*⁴. We do not think that these decisions

1. A.I.R. 1955 S.C. 352.

2. A.I.R. 1956 S.C. 60.

3. (1961) 1 S.C.R. 957; (1961) 2 S.C.J. 477.

4. Since reported in (1953) 1 S.C.J. 1.

help the appellant. It was pointed out in *Madhaorao Phalke's case*¹, that in determining the question whether a particular order of a Sovereign Ruler in whom was combined all legislative, executive and judicial functions it would be necessary to consider the character of the orders passed. Their Lordships then examined the Kalambandi under consideration before them and pointed out that "the nature of the provisions contained in this document unambiguously impresses upon it the character of a statute or a regulation having the force of a statute". Same was the position in *Ameer-un-nissa's case*², and the case of the *Director of Endowments, Govt. of Hyderabad*³ where this Court had to deal with the effect of Firmans issued by the Nizam who was at the time an absolute Ruler. It was held that such Firmans had the effect of law because in all domestic matters, the Nizam issued Firmans to determine the rights of his subjects. The Firmans were not based on consent, but derived their authority from the command of the Sovereign viz., the Nizam, expressing his Sovereign will. For example, in *Ameer-un-nissa's case*², the Firman set aside the decision of a Special Commission in respect of certain claimants and though a subsequent Firman revoked the earlier Firman, it did not restore the decision of the Special Commission. It was in these circumstances that this Court observed :

"The determination of all these questions depends primarily upon the meaning and effect to be given to the various 'Firmans' of the Nizam which we have set out already. It cannot be disputed that prior to the integration of Hyderabad State with the Indian Union and the coming into force of the Indian Constitution, the Nizam of Hyderabad enjoyed uncontrolled sovereign powers. He was the supreme Legislature, the supreme Judiciary and the supreme head of the Executive, and there were no constitutional limitations upon his authority to act in any of these capacities. The 'Firmans' were expressions of the Sovereign will of the Nizam and they were binding in the same way as any other law ; nay, they would override all other laws which were in conflict with them. So long as a particular 'Firman' held the field, that alone would govern or regulate the rights of the parties concerned, though it could be annulled or modified by a later 'Firman' at any time that the Nizam willed."

These observations do not support the extreme view that any and every order of a Sovereign Ruler is law. In *Promed Chandra Deb's case*⁴, the Khorposh grants were considered in the context of the rules laid down in Order 31 of the Rules, Regulations and Privileges of Khanjadars which were accepted by the Ruler of the State as the law governing the rights of Khorposhdars. It was in these circumstances held that the Rules continued in force till they were changed by a competent authority, and the grants made in accordance with those Rules continued to be valid.

In our view, none of the aforesaid decisions go the extent of laying down that any and every order of a Sovereign Ruler who combines in himself all functions must be treated as law irrespective of the nature or character of the order passed. We think that the true nature of the order must be taken into consideration, and the order to be law must have the characteristics of law, that is, of a binding rule of conduct as the expression of the will of the Sovereign, which does not derive its authority from mere consensus of mind of two parties entering into a bargain. It is not necessary for this purpose to go into theories of legal philosophy or to define law. However law may be defined, be it the command of the supreme Legislature as some jurists have put it or be it a "body of rules laid down for the determination of legal rights and duties which Courts recognise," there is an appreciable distinction between an agreement which is based solely on consent of parties and a law which derives its sanction from the will of the Sovereign. A contract is essentially a compact between two or more parties ; a law is not an agreement between parties but is a binding rule of conduct deriving its sanction from the Sovereign Authority. From this point of view, there is a valid distinction between a particular agreement between two or more parties even if one of the parties is the Sovereign Ruler, and the law relating generally to agreements. The former rests on consensus of mind, and the latter expresses the will of the Sovereign. If one bears in mind this distinction, it seems clear enough that the agreement of 17th April, 1941 even though sanctioned by the Ruler and purporting to be on his behalf, rests really on consent. We have

1. (1961) 1 S.C.R. 957; (1961) 2 S.C.J. 477.

2. A.I.R. 1955 S.C. 352.

3. A.I.R. 1956 S.C. 60.

4. Since reported in (1963) 1 S.C.J. 1.

been taken through the correspondence which resulted in the agreement and our attention was particularly drawn to a letter dated 22nd April, 1938 in which the Ruler was stated to have sanctioned the terms and concessions decided upon by his Ministers in their meeting of 25th February, 1938. We do not think that the correspondence to which we have been referred advances the case of the appellant. On the contrary, the correspondence shows that there were prolonged negotiations, proposals and counter-proposals, offer and acceptance of terms. . . . all indicating that the matter was treated even by the Ruler as a contract between his Government and the appellant. That is why in the letter dated 22nd April, 1938 it was stated that Messrs. Crawford Bailey & Co., Solicitors, would draw up a formal agreement embodying the terms agreed to by the parties. This resulted ultimately in the execution of the agreement dated 17th April, 1941. To call such an agreement as law is in our opinion to misuse the term 'law'.

It is also worthy of note in this connection that clause 6 of the agreement purports to give the appellant exemption not only from State excise duty, but also from Federal excise duty; similarly not only from State income-tax, but from Federal income-tax or super-tax or surcharge. It is difficult to see what authority the Jodhpur Ruler had, to give exemption from Federal excise duty or Federal income-tax. Such an exemption, if it were to be treated as law, would be beyond the competence of the Ruler. A Ruler can make a law within his own competence and jurisdiction. He cannot make a law for some other Sovereign. Such an exemption would be a dead letter and cannot have the force of law. Learned Counsel for the appellant suggested somewhat naively that the Ruler might exercise his influence on the other Sovereign (if and when Federation came into existence) so as to secure an exemption from Federal tax for the appellant. Surely, an assurance of this kind to exercise influence on another Sovereign Authority, assuming that the effect of the relevant clause is what learned Counsel has submitted, as to which we have great doubt, will at once show that it has not the characteristics of a binding rule of conduct. It is doubtful if such an assurance to exercise influence on another Sovereign Authority can be enforced even as a contract not to speak of law.

Learned Counsel for the respondents referred us to several other clauses of the agreement which in his opinion showed that the agreement read as a whole could not be treated as law, because some of the clauses merely gave an assurance that the State would take some action in future; as for example, clause 8 which gave an assurance to amend the law in future. He contended that an assurance to amend the law in future cannot be treated as present law. There is, we think, much force in this contention. When these difficulties were pointed out to learned Counsel for the appellant, he suggested that we should separate the various clauses of the agreement and treat only those clauses as law which gave the appellant a present right. We do not see how we can dissect the agreement in the manner suggested and treat as law one part of a clause and treat the rest as an agreement only.

We should notice here that clause 6 of the agreement does not refer to excise duty or income-tax to be imposed by the Union of India. As a matter of fact, nobody could envisage in 1941 the constitutional developments which took place in 1947-1950, and when the parties talked of Federal excise duty and Federal income-tax, they had in mind the scheme of Federation envisaged by the Government of India Act, 1935—which scheme never came into operation. It is difficult to see how the agreement in any view of the matter can be treated as law in respect of a tax or duty imposed by the Union Government when there is no mention of it therein.

The argument if carried to a *reductio ad absurdum* would come to this that every order of the Ruler would have to be carried out by the succeeding Sovereign. That order may be almost of any kind, as for example, an order to thrash a servant. We have no doubt in our minds, that the nature of the order must be considered for determining whether it has the force of law. Article 372 of the Constitution which continues existing law must be construed as embracing those orders only which have the force of law—law as understood at the time,

There has been a lot of argument as to what learned Counsel for the appellant has characterised as 'legislative contracts' an expression used mostly in American decisions relating to the limitation placed by the 'contract clause' in the American Constitution upon action taken by the State Legislature in respect of pre-existing contracts (see *Piqua Branch of the State Bank of Ohio v. Jacobknoon*¹). We do not think those decisions have any bearing on the question before us, which is simply this: does a compact between two or more parties, purely contractual in nature, become law because one of the parties to the contract is the Sovereign Ruler? The American decisions throw no light on this question. Learned Counsel also referred us to the statement of the law in Halsbury's Laws of England, Vol. 8, Third Edition, paragraph 252, at page 146 relating to statutory confirmation of void contracts by means of a local and personal Act of Parliament: the effect of such a statute is to make the agreement valid *in toto*. The principle is that where an Act of Parliament confirms a scheduled agreement, the agreement becomes a statutory obligation and is to be read as if its provisions were contained in a section of the Act (see *International Railway Company v. N. P. Commission*²). We fail to see how this principle has any application in the present case. There is nothing to show that the agreement in the present case was confirmed as a law by the Ruler; on the contrary, we have shown earlier that it was always treated as a contract between two parties. There is no magic in the expression 'legislative contract'. A contract is a compact between two or more parties and is either executory or executed. If a statute adopts or confirms it, it becomes law and is no longer a mere contract. That is all that a 'legislative contract' means. In the case before us there is no 'legislative contract.'

In view of our conclusion that the agreement of 17th April, 1941 is not law, it is perhaps unnecessary to decide the further question as to whether section 3 of the Rajasthan Ordinance, 1949 (Ordinance I of 1949) continued it or whether section 30 of the Rajasthan Excise Duties Ordinance, 1949 (Ordinance XXV of 1949) repealed it. We may merely say that with regard to the effect of section 30, learned Counsel for the appellant relied on the principle that the presumption is that a subsequent enactment of a purely general character is not intended to interfere with an earlier special provision for a particular case, unless it appears from a consideration of the general enactment that the intention of the Legislature was to establish a rule of universal application in which case the special provision must give way to the general (see paragraph 711, page 467 of Vol. 36, Halsbury's Laws of England, Third Edition, and *Williams v. Pritchard*³, and *Eddington v. Borman*⁴.)

On behalf of the respondents it was submitted that section 30 of the Rajasthan Excise Duties Ordinance, 1949, in express terms, repealed all laws dealing with matters covered by the Ordinance, and section 3 thereof dealt with excise duties on goods produced or manufactured in Rajasthan, therefore, there was no room for the application of the maxim *generalia specialibus non derogant* and section 30 clearly repealed all earlier laws in the matter of excise duties or exemption therefrom. It is perhaps unnecessary to decide this question; because we have already held that the agreement of 17th April, 1941 was neither law nor had the force of law. We may merely point out that the question is really one of finding out the intention of the Legislature, and in view of the very clear words of section 30 of the Rajasthan Excise Duties Ordinance, 1949 and of the repealing provisions in the Finance Act, 1950, it would be difficult to hold that the earlier special law on the subject still continued in force.

We proceed now to consider the second line of argument pressed on behalf of the appellant. So far as the Union Government and its officers are concerned, there is, we think, a very short but convincing answer to the argument. The agreement in question contains no term and no undertaking as to exemption from excise duty or income-tax to be imposed by the Union Legislature in future. We have pointed out earlier that the undertaking, such as it was, referred to Federal excise duty and Federal income-tax and we have further stated that the Federation con-

1. 14 L. Ed. 977.

2. A.I.R. 1937 P.C. 214.

3. 100 E.R. 862.

4. 100 E.R. 863.

templated by the Government of India Act, 1935 never came into existence. The Union which came into existence under the Constitution of 1950 is fundamentally different from the Federation contemplated under the Government of India Act, 1935. Therefore, in the absence of any term as to exemption from excise duty or income-tax to be imposed by the Union Legislature, the question of succeeding Sovereigns accepting such a term and an obligation arising therefrom on 26th January, 1950 by means of Article 295 (1) (b) of the Constitution cannot at all arise. Surely, a term or undertaking which is non-existent cannot give rise to a right or obligation in favour of or against any party. On this short ground only, the claim of the appellant should be rejected against the respondents in so far as the levy of excise duty or tax by the Union is concerned, apart altogether from any question whether the Ruler of Jodhpur or even the United State of Rajasthan could legally bind the future action of the Union Legislature.

It is now well settled by a number of decisions of this Court that an "act of State" is the taking over of Sovereign powers by a State in respect of territory which was not till then a part of it, by conquest, treaty, cession or otherwise, and the municipal Courts recognised by the new Sovereign have the power and jurisdiction to investigate and ascertain only such rights as the new Sovereign has chosen to recognise or acknowledge by legislation, agreement or otherwise; and that such a recognition may be express or may be implied from circumstances. The right which the appellant claims stems from the agreement entered into by the Ruler of Jodhpur. The first question is, did the succeeding Sovereign, the United State of Rajasthan, recognise the right which the appellant is now claiming? The second question is, did the next succeeding Sovereign, the State of Rajasthan, recognise the right? As against the State of Rajasthan the main claim of the appellant is based on that part of clause 6 which says that if any such duty (or tax) has to be paid by the company, the State will refund the same to the company. The appellant claims as against respondent No. 2 a refund of the duty or tax as and when it is paid to the Union Government by the appellant.

The learned District Judge found that the Ruler of Jodhpur acted upon the agreement in the matter of customs-concessions granted to the appellant and accepted the royalty as per clause 12 of the agreement; but the question relating to excise duty never came before the Jodhpur State as no such duty was leviable in the State. In the High Court Jagat Narayan, J. dealt with the evidence on the point and gave a list of documents bearing on it. He pointed out that the Director of Industries of the United State of Rajasthan no doubt made demands for the payment of royalty not only for the period since the formation of the United State of Rajasthan, but also for arrears of royalty for the period prior to the formation of that State. He found however that as to exemption from excise duty or the claim of refund, the United State of Rajasthan had in no way affirmed the agreement. The learned Judge said :

"What has to be determined is whether on the facts and circumstances appearing from the evidence on record it can be said that the United State of Rajasthan affirmed the agreement. I am firmly of the opinion that no such inference can be drawn. The State did not make up its mind whether or not to abide by the agreement and pending final decision the agreement was acted upon provisionally."

So far as the Part B State of Rajasthan is concerned, there is nothing in the record to show that it had affirmed the agreement. Mr. Justice Bapna agreed with his learned colleague on the Bench and referred specially to a letter dated 20th January, 1950 which was a letter from the Commissioner of Excise, Jodhpur, to the appellant. In that letter the appellant was informed that it was liable to pay excise duty in accordance with the Rajasthan Excise Duties Ordinance, 1949. The appellant sent a reply in which it stated that excise duty was not leviable by reason of the agreement dated 17th April, 1941. Further correspondence followed and finally a reply was given on 10th May, 1952 in which the Government of Rajasthan said that

"the rights and concessions granted to the company and the liabilities and obligations accepted by the former Jodhpur State under the agreement are extraordinary, unconscionable and disproportionate to the public interest".

The letter ended by saying that the claim of the appellant to exemption could not be accepted. Another letter on which the appellant relied was dated 1st May, 1950. In this letter the Government of Rajasthan said that the burden of the excise duty on cloth produced by the appellant fell on the consumers who purchased the cloth; therefore the Government of Rajasthan did not consider it necessary to exempt the appellant from payment of excise duty. It is worthy of note that all this correspondence started within a very short time of the promulgation of the Rajasthan Excise Duties Ordinance, 1949. From this correspondence Bapna, J. came to the conclusion that neither the United State of Rajasthan nor the State of Rajasthan affirmed the agreement. We see no reasons to take a different view of the correspondence to which our attention has been drawn.

What then is the position? If the new Sovereign, namely, the United State of Rajasthan or the Part B State of Rajasthan, did not affirm the agreement so far as exemption from the excise duty or income-tax was concerned, the appellant is clearly out of Court. Learned Counsel for the appellant has relied on Article 295 (1) (b) of the Constitution. That Article is in these terms:—

“295. (1) As from the commencement of this Constitution—

(a) all property and assets which immediately before such commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List, and

(b) all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities or obligations were incurred before such commencement will thereafter be purposes of the Government of India relating to any of the matters enumerated in the Union List,

subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

(2) Subject as aforesaid, the Government of each State specified in Part B of the First Schedule shall, as from the commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all.....rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in clause (1).”

The argument is that the Article provides a constitutional guarantee in the matter of rights, liabilities and obligations referred to in clause (b) and no law can be made altering those rights, liabilities and obligations. In support of this argument our attention has been drawn to Article 245 which says that subject to the provisions of the Constitution Parliament may make laws for the whole or any part of the territory of India, etc. The contention is that the power of Parliament to make laws being subject to the provisions of the Constitution, Article 295 which is one of the provisions of the Constitution controls the power of Parliament to make laws in respect of rights, liabilities, obligations, etc. referred to in Article 295 (1) (b) and therefore Parliament cannot pass any law altering those rights, liabilities and obligations.

We do not think that this is a correct interpretation of Article 295 of the Constitution. But before going into the question of interpretation of Article 295 it may be pointed out that if the United State of Rajasthan did not affirm the agreement, then the appellant had no enforceable right against either the United State of Rajasthan or the Part B State of Rajasthan. Under Article 295 (1) (b) there must be a right or liability on an Indian State corresponding to a State specified in Part B of the First Schedule which can become the right or liability of the Government of India, etc. If the right itself did not exist before the commencement of the Constitution and could not be enforced against any Government, the question of its vesting in another Government under Article 295 (1) (b) can hardly arise.

The scheme of Article 295 appears to be this. It relates to succession to property, assets, rights, liabilities and obligations. Clause (a) states that from the commencement of the Constitution all property and assets which immediately

before such commencement were vested in an Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held be purposes of the Union. Clause (b) states that all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise shall be the rights, liabilities and obligations of the Government of India if the purposes for which such rights were acquired or liabilities and obligations were incurred be purposes of the Government of India. There is nothing in the Article to show that it fetters for all time to come, the power of the Union Legislature to make modifications or changes in the rights, liabilities, etc. which have vested in the Government of India. The express provisions of Article 295 deal with only two matters, namely, (1) vesting of certain property and assets in the Government of India, and (2) the arising of certain rights, liabilities and obligations on the Government of India. Any legislation altering the course of vesting or succession as laid down in Article 295 will no doubt be bad on the ground that it conflicts with the Article. But there is nothing in the Article which prohibits Parliament from enacting a law altering the terms and conditions of a contract or of a grant under which the liability of the Government of India arises. The legislative competence of the Union Legislature or even of the State Legislature can only be circumscribed by express prohibition contained in the Constitution itself and unless and until there is any provision in the Constitution expressly prohibiting legislation on the subject either absolutely or conditionally, there is no fetter or limitation on the plenary powers which the Legislature enjoys to legislate on the topics enumerated in the relevant Lists (*Maharaj Umeg Singh and others v. State of Bombay and others*¹). In our opinion there is nothing in Article 295 which expressly prohibits Parliament from enacting a law as to income-tax or excise duty in territories which became Part B States, and which were formerly Indian States, and such a prohibition cannot be read into Article 295 by virtue of some contract that might have been made by the then Ruler of an Indian State with any person.

There is another aspect of this question. The rights, liabilities and obligations referred to in Article 295 (1) (b) are, by the express language of the Article, subject to any agreement entered into in that behalf by the Government of India and the Government of the State. Such an agreement was entered into between the President of India and Rajpramukh of Rajasthan on 25th February, 1950. It is necessary to explain how this agreement came into existence. A Committee known as the Indian States Finance Enquiry Committee was appointed by a resolution of the Government of India dated 22nd October, 1948 to examine and report upon, among other things, the present structure of public finance in Indian States and the desirability and feasibility of integrating Federal finance in Indian States. This Committee submitted its report on 22nd October, 1949. The agreement between the President of India and the Rajpramukh of Rajasthan said :

"The recommendations of the Indian States Finance Enquiry Committee, 1948-49 (hereafter referred to as the Committee) contained in Part I of its Report read with Chapters I, II and III of Part II of its Report, in so far as they apply to the State of Rajasthan (hereafter referred to as the State) together with the recommendations contained in Chapter VIII, Part II of the Report, are accepted by the parties hereto, subject to the following modifications."

It is not necessary for our purpose to set out the modifications in detail. It is enough to say that there is nothing in the modifications which in any way benefits the appellant. One of the modifications relates to State-owned and State-operated enterprises which are to be exempt from income-tax, etc. The appellant is neither a State-owned nor a State-operated enterprise. Another modification states :

"State-sponsored Banks or similar State-sponsored enterprises in the State now enjoying any explicit tax exemptions shall be treated as 'Industrial Corporations' for purposes of the continuance of the income-tax concessions now enjoyed by them in accordance with paragraph 11 (3) (b) of the Annexure to Part I of the Committee's Report."

Now the appellant is neither a State-sponsored Bank nor a State-sponsored enterprise. So far as the appellant is concerned the recommendations of the Committee which were accepted in the agreement *inter alia* said :

"Any special financial privileges and immunities (affecting "Federal" revenues) conferred by the State upon other individuals and corporations should ordinarily be continued on the same terms by the Centre, subject to a maximum period of ten (or fifteen) years, and subject also to limiting in other ways any such concessions as may be extravagant against the public interest."

The recommendation quoted above clearly shows that it was open to the Union to limit in any way it thought fit any concessions as appear to the Union Government to be extravagant and against the public interest. In view of this recommendation which was part of the agreement entered into between the President of India and the Rajpramukh of Rajasthan on 25th February, 1950, the appellant can hardly plead it has a constitutional guarantee to claim exemption from excise duty or income-tax.

This finishes the second line of argument urged on behalf of the appellant. As to the pleas based on Articles 19 and 31 of the Constitution it is enough to say that on our findings the appellant had no enforceable right either against the State Government of Rajasthan or the Union Government on 26th January, 1950. It is obvious, therefore, that the appellant cannot invoke to its aid either Article 19 or Article 31 of the Constitution. As to the claim of refund which the appellant preferred against the State of Rajasthan, the appellant's position is no better. If neither the United State of Rajasthan nor the Part B State of Rajasthan affirmed the agreement of 17th April, 1941, the appellant cannot enforce any right against respondent No. 2 on the basis of that agreement.

In the trial Court as also in the High Court the question of frustration of the contract was canvassed and gone into. The Courts found that the contract was frustrated. In view of the findings at which we have arrived, it is now unnecessary to consider that question. Therefore we do not propose to deal with it.

For the reasons given above, we have come to the conclusion that the appeals are without any merits. We accordingly dismiss them with costs. One hearing fee.

V.S.

Appeals dismissed.

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